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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-000364

Richard A. Gorman . . . . . Respondent,

v.

John C. Monarch . . . . . Appellant.

APPELLANT'S FINAL OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Decisions

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court abused its discretion by striking Appellant's answer and counterclaim as a discovery sanction where the record reflected compliance, no willful misconduct, and no resulting prejudice to Respondent.
2. Whether the trial court erred in rejecting less severe sanctions without adequate analysis of their sufficiency to address any alleged discovery violation, in contravention of South Carolina precedent requiring sanctions to be proportional.
3. Whether the trial court improperly relied on contested expert opinions suggesting data tampering despite unrefuted forensic evidence demonstrating that Appellant's laptop was authentic and its data unaltered.
4. Whether the trial court misinterpreted the August 21, 2020 consent order by construing it to waive Appellant's rights to assert privilege, object to production, or oppose forensic imaging protocols.
5. Whether the cumulative effect of the trial court's discovery rulings deprived Appellant of a fair opportunity to litigate his claims on the merits, warranting reversal and remand for trial.

STATEMENT OF THE CASE

This appeal arises from the trial court's order striking Appellant's answer and counterclaims as a discovery sanction, which was not warranted under the circumstances. The trial court's order must be reversed and vacated, and the case remanded.

The underlying dispute centers on a claim brought by Respondent in 2014 for defamation and blackmail. For the past 5 years, the litigation has been far less focused on the merits of Respondent's claim and far more focused on Appellant's compliance with orders regarding electronic discovery.

In 2020, the trial court entered a consent discovery order that required Appellant to disclose electronic devices that he was using in 2013. Appellant did so and identified two: a 2013 MacBook and an iPhone 5. Appellant initially believed that he had traded in both devices, with the contents of the MacBook having been transferred to a newer computer, while the contents of iPhone were likely lost. However, Appellant later found his MacBook, and a forensic examination of that device yielded a complete backup copy of the iPhone's contents from 2013.

After the entry of the consent discovery order, Respondent argued that Appellant had waived his right to object to a forensic analysis of the devices (which was ultimately performed), as well as to any protections against the disclosure of confidential, sensitive, private, or privileged information. Appellant disagreed. In March 2022, the trial court entered an order that established a forensic protocol for an inspection of Appellant's electronic devices. This order sought to provide protection for Appellant's legitimate privacy interests and privilege rights; but, as entered, Appellant's compliance was legally, financially, and practically impossible.

Regardless, in April 2023, the trial court entered an order directing Appellant to strictly comply with the prior discovery orders, warning that his non-compliance would result in the striking of his pleadings (which consisted of an answer and counterclaim). Appellant complied. No inculpatory evidence was found on Appellant's devices.

Later, however, Respondent's forensic expert suggested that data had been lost from Appellant's MacBook, though he could not say what data was lost, when, or how. Appellant's forensic expert disputed these conclusions. The assertion that data had been lost from Appellant's MacBook was disputed by Appellant's forensic expert.

But, in an order dated February 26, 2025, the trial court granted Respondent's motion for sanctions, concluding that Appellant had failed to comply with the trial court's prior discovery orders, and that the most severe discovery sanction available—striking his pleadings—was warranted. This appeal followed.

The immediate issue presented by this appeal is the propriety of the trial court's decision to strike Appellant's answer and counterclaim as a discovery sanction. But in resolving this appeal, it may be appropriate to consider the broader contours of electronic discovery from perspectives of both practice and policy. Those considerations may include: (i) what showing must be made to support an order for the forensic inspection of an adverse party's electronic devices; (ii) what time-limitations are appropriate for electronic discovery; (iii) what protections are necessary for protecting a party's legitimate privacy interests and privilege rights in the context of electronic discovery; and (iv) whether and to what extent the existence of genuine disputes of material fact regarding a party's compliance with a discovery order affect the trial court's ability to sanction the party, particularly as to the sanction of striking that party's pleadings.

STATEMENT OF FACTS

The procedural history of this case is long, complex, and—as one order described—"tortured." (R. 96.) The undersigned appreciates the Court's patience in navigating the extensive record and offers the following summary of the case's history in the hope that it will provide helpful context for the matters now on appeal—the striking of Appellant's answer and counterclaim as a discovery sanction.

The case is one of several filed between the parties, with related litigation having taken place in both Pennsylvania and Arizona on what Respondent admits are the "same claims." (R. 7.) The genesis of this dispute—of all these disputes—goes back to a set of unfriendly communications that were exchanged on Twitter (now known as "X.com") in 2013 over college football. (R. 463 at 262:25–264:22.) Apparently, before this online exchange, Appellant and Respondent didn't know each other. (Id.) Although they were both participants in the same general type of business, they lived in different states and had never crossed paths. Following their exchange on Twitter, though, Respondent became intensely fixated on Appellant, leading to this lawsuit.

Respondent alleges that, shortly after the Twitter exchange, Appellant launched a blackmail campaign under the online alias "Rick Rollinski," threatening to spread damaging information about Respondent unless he paid a substantial sum in Bitcoin to an anonymous account. (See R. 1414; see also R. 1432:7–1435:15.) Respondent contends that, when the supposed extortion attempt failed, Appellant then collaborated with others to defame him and harm his business interests by circulating the accusation that Respondent is a pedophile. (R. 163 at ⁋ 51(c).) There is no evidence that Appellant is responsible for any of these acts, and Appellant has steadfastly denied his involvement.

As it turns out, Respondent is a registered sexual offender who spent years in a Florida state prison after pleading to sexual assault. (R. 1414.) This information is discoverable by anyone through a simple internet search. Thus, the defamation at issue is not whether Respondent is a convicted sexual offender; it's whether his victim was a minor.

Over the years, Respondent has sued Appellant and others under many different causes of action and in several jurisdictions. Now, however, only two of Respondent's causes of action against Appellant remain: an action for defamation; and an action for intentional infliction of emotional distress. Appellant denies—and has consistently denied—Respondent's allegations, and has brought his own counterclaim against Respondent for defamation for posts that Respondent has made about Appellant on a fake-news website owned and operated by Respondent. (R. 202.)

Shortly after the parties' Twitter exchange, in 2013, Respondent's lawyers sent Appellant a preservation letter. (R. 594.) Respondent filed the underlying lawsuit on August 8, 2014. (R. 107.)

From the outset, this case has been plagued by delays. The first major delay occurred on December 1, 2015, when the trial court granted a stay at Respondent's request—over Appellant's objection—as litigation over similar issues was already pending in federal court in Pennsylvania. (R. 1.) That stay halted proceedings in this case for more than 8 months. The stay was lifted on August 16, 2016, following settlement of the Pennsylvania case. (R. 4.) Notably, Respondent had the same opportunity to pursue discovery in the Pennsylvania case as he has had in this case. (R. 553–54.)

Two months after the stay was lifted, on October 10, 2016, Respondent filed an amended complaint that expanded the dispute to include Appellant's company—Direct Outbound Services ("DOS")—as a named party. (R. 138.) On November 21, 2016—the deadline for DOS to respond—Appellant's counsel filed a motion to dismiss DOS. However, due to a technical error with the e-filing system, the filing was rejected. (R. 8.)

The very next day, Respondent's counsel filed an affidavit of default. (R. 261.) Acting swiftly, Appellant's counsel refiled the motion to dismiss and emailed Respondent's counsel to request that the affidavit of default be withdrawn. (R. 7.) Despite knowing that the filing error was caused by a system glitch, and despite "acknowledging the timeliness of the [m]otion," Respondent refused the request. (R. 8.) This is the first of at least four times that Respondent would attempt victory through procedural default. The trial court denied Appellant's motion to dismiss on February 14, 2017. (Id.) Seventeen days later, Respondent filed another affidavit of default—this time, as to DOS—and a motion for judgment by default as to Appellant. (Id.)

In a timely motion, Appellant moved to set aside default, which was denied. (R. 8.) Appellant then filed a motion for reconsideration, which the court took under advisement while ordering the parties to mediate. (R. 8–9.) This and three other attempts at mediation would prove fruitless. (R. 9.) Ultimately, the court set aside default, noting the lack of prejudice to Respondent, the "severe and inequitable injustice" that default would impose, and the law's clear preference on deciding cases on their merits. (Id.)

With the matter of default resolved, and as discovery progressed, Appellant learned of a fake-news website which was owned and operated by Respondent. (See R. 389 n.3.) The site published articles attacking Appellant and his business, labeling him a

fraudster and a blackmailer. (R. 424 & 425.) Appellant sought an injunction to prevent Respondent from using his fake-news website to defame him. (R. 405.) Although the court denied Appellant's request for injunctive relief, it acknowledged Appellant's fears and warned the parties about the "perils of pre-trial publicity." (R. 14.)

On March 15, 2018, Respondent filed a motion to compel, alleging that Appellant's discovery responses were incomplete. (R. 285.) His concerns focused on boilerplate objections made by Appellant's former counsel and on a chat log between Appellant and an individual using the alias "Ilya Putin." (R. 285 & 288.) "Ilya Putin" was the online alias of Illya Shpetrik—the person who actually posted the alleged defamatory material at issue in this litigation. (See R. 1478:17–1486:15.) At this stage of the litigation, at least, Respondent was not suggesting that Appellant had acted in bad faith or had otherwise engaged in discovery abuse.

On July 31, 2018, Respondent filed a new affidavit of default, asserting that a trial court ruling on July 3 had made the second amended complaint the operative pleading. (R. 445.) Respondent claimed that, because Appellant had not responded to that pleading within 15 days, Appellant was in default. (Id.) Respondent's third attempt to secure a judgment through procedural default was not successful. (R. 17.)

On January 19, 2019, Respondent filed a notice of appeal with respect to an interlocutory decision of the trial court. (R. 27.) Respondent voluntarily withdrew the appeal on July 15, 2019. (See R. 21.)

Just 10 days before withdrawing his appeal, Respondent attempted to hold Appellant in default again. On July 5, 2019, Respondent filed yet another affidavit of default, asserting that, although Appellant had timely moved to dismiss the second

amended complaint, he had never refiled his amended answer. (R. 453.) On August, 21, 2019, Respondent filed another affidavit of default, which raised—for the first time—the suggestion that Appellant's electronic discovery responses were deficient. (R. 458 at ¶ 4.) This was 5 years after the case had been filed—6 years after the preservation letter had been sent.

The court declined to hold Appellant in default, finding that, by virtue of Respondent's appeal, Appellant's time to file a responsive pleading had been stayed. (R. 28.) The order further held that Appellant's answer was timely and that the case should "proceed on the merits." (R. 29.)

The next significant delay occurred on October 26, 2020, when Respondent filed a motion under Rule 40(j) to remove the case from the active docket. (R. 36.) Respondent presumably wanted to focus on new litigation he had brought in Pennsylvania federal court against Shpetrik. However, after the Pennsylvania litigation settled, the instant case was restored to the active docket and a new case number was assigned. (R. 42.)

Then, a new and central dispute emerged: Appellant's electronic devices from 2013—devices that he had used 8 years earlier—became the focus of discovery. Respondent sought access to these devices in an effort to uncover evidence of Appellant's wrongful conduct, evidence that—in 8 years of litigation in multiple jurisdictions—Respondent had never found. On August 21, 2020—oddly, while the case was suspended under Rule 40(j)—the parties entered into a consent discovery order in which, in relevant part, Appellant would identify electronic devices that he had used during 2013. There were two: an iPhone 5 and a MacBook Pro laptop. (R. 51–52.) Appellant informed Respondent that, since 2013, he had traded in his iPhone 5 for newer

models as part of routine upgrades. (R. 558.) Although Appellant initially advised that the MacBook was no longer in his possession and that its data had been transferred to a newer device, Appellant later found his MacBook and discovered that all data from the relevant time appeared to be intact. (R. 52.) A subsequent forensic analysis also found that a digital copy of Appellant's iPhone 5 had been saved to the MacBook. (R. 1145–46 at ¶ 9.) In short, and incredibly, all of the electronic information Respondent had sought—dating back nearly a decade—was fully available for inspection and was inspected. The consent order also explicitly directed that "[t]he parties are ordered to cooperate concerning the expeditious provision of [the MacBook and iPhone] as the Plaintiff may select for examination by the Plaintiff or such persons as he may choose." (R. 32.)

Regardless of the foregoing circumstances, Respondent filed a motion for sanctions on December 9, 2020, alleging destruction of evidence. (R. 501.) In that motion, Respondent claimed that Appellant had destroyed his iPhone 5 and wrongly stated that, although Appellant's laptop had been preserved, its contents had been "wholly removed." (R. 502.) Respondent went on to assert, without any factual basis, that data transfers had erased all evidence of spoliation. (Id.) He also argued that, since Appellant was tech-savvy, the court should find the spoliation willful. (R. 503.) Respondent also filed a motion to compel electronic discovery, seeking direct access to Appellant's laptop, including permission to conduct a full forensic image. (R. 537.)

Appellant viewed Respondent's motion as extreme, noting that forensic imaging of a personal laptop is typically reserved for exceptional circumstances. He also expressed serious concern that sensitive personal, privileged, or confidential information

unrelated to the case might be discovered that Respondent would publish on his fake-news website, as he had done before. (See R. 387–93.) In Appellant's memorandum in opposition to the motion to compel, Appellant detailed the circumstances of his full participation in discovery and challenged Respondent's entitlement to a forensic image of his laptop. (R. 552–59.)

In two separate orders entered September 15, 2021, the court granted Respondent's motion to compel and continued the motion for sanctions, apparently reserving a ruling until the MacBook could be produced and examined. (See R. 45 & 48.) In granting the motion to compel, the court established a framework that it believed—mistakenly, as Appellant later argued—would adequately protect Appellant's legitimate privacy interests and privilege rights. (R. 53–57.) Under the order, Appellant was required to provide a neutral third-party expert with all devices identified in the August 21, 2020 consent order: the iPhone 5 and the 2013 MacBook Pro. (Id.)

Before producing these devices, and in only 21 days, Appellant's counsel was directed to prepare a privilege log identifying all confidential or privileged information contained on the devices. (R. 53.) The volume of data—approximately 1 terabyte—made this task extraordinarily burdensome, if not impossible. (R. 642.) The expert would then examine the devices, summarize their contents, and make two copies. Appellant was to provide the expert with a list of key words or search terms that were likely to yield privileged material. Using Appellant's keyword list, the expert would identify and exclude potentially privileged information from one of the copies. (R. 53–54.) The flagged data would be returned to Appellant, who would have just 10 days to review it and assert specific privilege claims. (R. 54.) After that, the expert would "sanitize" the

digital copy by removing privileged content, and then provide the remaining, supposedly non-privileged data to both parties. (Id.)

The court's order caused Appellant significant concern. He viewed the directive to forensically image his laptop as an extraordinary measure, and he was particularly troubled by the tight deadlines imposed to either prepare a comprehensive privilege log or identify privileged material through keywords. In an effort to protect his privacy and the confidentiality of sensitive data, Appellant filed a motion under Rule 59(e). (R. 637.) In support of his motion, Appellant relied heavily on the Sedona Principles—a widely recognized set of best practices for electronic discovery intended to guide and supplement civil procedure rules. (See generally id.) Citing those principles, the motion emphasized that "[i]nspection of an opposing party's computer system . . . is the exception and not the rule for discovery," and that discovery rules do not create "a routine right of direct access to an opposing party's electronic information system." (R. 638 (quoting Sedona Principles).) Appellant further argued that the court's discovery protocol presented a substantial risk that confidential, sensitive, private, and privileged information would be inadvertently produced. (R. 643.) Appellant specifically argued that, contrary to Respondent's belief, Appellant had not waived the right to object to forensic imaging of his devices, nor was he precluded from asserting privilege over protected materials. (R. 648–49.)

In a further effort to protect his privacy, privilege, and confidentiality interests, Appellant attempted an interlocutory appeal of the order granting Respondent's motion to compel. However, on May 24, 2022, the appeal was dismissed, as the Court of Appeals determined that the underlying order was not immediately appealable. (R. 67.)

On January 12, 2023, the trial court found that "the safeguards in the previous order were more than sufficient to guard against unreasonable invasion [of privacy and privilege]." (R. 75.) The court characterized its safeguards as "a safety net of rigorous protections." (Id.) In interpreting its prior decisions, the court held that Appellant "had already consented to an order directing him to simply provide the Plaintiff with devices for examination, period, with no protocols in place to protect privilege, privacy, or anything else." (Id. (emphasis added).) This was not correct.

On February 10, 2023, Respondent filed yet another motion for sanctions—this time, for alleged refusal to comply with the court's order. (R. 696.) Respondent argued that Appellant had violated prior orders by failing to produce his laptop for forensic imaging and asserted that Appellant's answer should be stricken. (R. 1138.) By that point, Respondent had deposed Shpetrik, the individual who had posted the allegedly defamatory content. During his deposition, Shpetrik did not implicate Appellant in either a defamation or a blackmail scheme against Respondent. (R. 1405; see also R. 1480:14-1484:24.)

However, Shpetrik testified to an online message exchange between himself and Appellant sometime in 2022 or 2023 which was conducted over a messaging platform called Telegram. (R. 1408–09.) Telegram allows the user initiating the chat to set a self-destruct timer, after which all messages in the conversation are automatically deleted. (R. 1408; see R. 246:11-25.) Despite undisputed testimony that Shpetrik was the individual who initiated the chat and set the conversation to automatically delete, Respondent argued that the deletion of the chat constituted willful spoliation of evidence for which Appellant was liable. (R. 1138.) Citing Appellant's refusal to waive privilege objections

related to his MacBook, the loss of his iPhone 5, and the failure to preserve the Telegram chat, Respondent argued that the most severe discovery sanction was warranted: striking Appellant's pleadings. (R. 1143.)

Appellant rejected Respondent's central accusation—that he had "thumbed his nose" at the court's authority—as wholly unfounded. (R. 1080.) Appellant had consistently sought to comply with discovery obligations and had actively explored ways to accommodate Respondent's requests. (R. 1085.) Although Appellant had serious concerns about turning over his MacBook for forensic imaging—particularly given the limited safeguards provided by the court—he nevertheless offered to facilitate discovery through a "viable, less intrusive alternative." (R. 1087.) Specifically, Appellant proposed allowing Respondent to submit a list of keyword searches, which Appellant would then search the laptop for. (R. 1085.)

In a related filing on March 13, 2023, Appellant also moved to schedule the case for trial. (R. 1078.) Given the prolonged procedural history, Appellant urged the court to set the case for trial swiftly. (Id.)

Respondent's motion for sanctions was decided on April 28, 2023. (R. 78.) In its ruling, the court reaffirmed its prior interpretation of the consent order and held that Appellant's continued refusal to permit digital imaging of the laptop was without merit and likely in bad faith. (R. 81.) The court ordered Appellant to comply with the consent order or have his answer stricken. (R. 82.) At the same time, the court acknowledged Appellant's concerns regarding the potential misuse of his electronic data. It expressly warned Respondent that any improper dissemination of information would result in severe sanctions. (R. 83.)

In prompt compliance with the court's order, Appellant provided his MacBook to the designated neutral expert, Steve Abrams. In a further demonstration of good faith and in an effort to avoid sanctions, Appellant also voluntarily produced his wife's laptop. (R. 1146 at ¶ 5.) However, Abrams was unable to conduct the forensic examination in accordance with the procedures outlined in the consent order, explaining that the protocol was "wholly inapplicable to whole disk encrypted hard drives" like Appellant's. (Id. at ¶ 7.)

Despite these technical challenges, on August 24, 2023, Abrams submitted an affidavit summarizing his findings regarding Appellant's laptop. (R. 1144.) Abrams found a backup file on the laptop which contained a digital copy of Appellant's iPhone 5, which Appellant had thought was lost. (R. 1147 at ¶ 9.) This backup file alone contained over 200,000 messages. (Id.) Abrams also located about 24,000 files flagged as possibly privileged, out of a total of more than 4 million. (R. 1147–48 at ¶ 10.) Abrams also located approximately 9000 files that were partially responsive to the allegations in the complaint, including files from the iPhone back-up. (Id.)

However, Abrams was confused by conflicting dates and patches of sparse data. (R. 1148 at ¶ 11.) In a supplemental affidavit filed on November 7, 2023, Abrams explained that, while the data on the MacBook extended back to 2013—confirming that the physical device was indeed Appellant's original 2013 laptop—some of the metadata associated with 2013 content inexplicably showed 2017 timestamps. (R. 1162–63 at ¶ 4.) Although the MacBook's serial number confirmed its manufacture date as 2013, the metadata on Abrams's forensic image reflected later dates. (Id.) As explained in a separate affidavit provided by another forensic expert, these discrepancies may have

resulted from the forensic imaging software itself, which can alter file metadata during the copying process. (R. 1321 at ¶ 7(5).) Additionally, Abrams noted that Appellant's laptop had, at various times, connected with other electronic devices, although the identity of those devices could not be determined, nor could the date of their connection. (R. 1327.)

The evidence gathered from Appellant's electronic devices did not support the allegations in Respondent's pleadings. (R. 1219.) While the data showed that Appellant had conducted internet searches related to Respondent and had encouraged others to seek information on Respondent's criminal sexual history, there was no indication that Appellant had ever referred to Respondent as a pedophile. (See generally R. 1161.) Moreover, the examination yielded no evidence suggesting that Appellant had participated in, or was connected to, any blackmail scheme against Respondent. (See generally id.)

Nevertheless, on August 25, 2023, Respondent filed a motion to strike Appellant's answer. (R. 1157.) Respondent accused Appellant of having submitted a fake laptop for examination. (Id.) In response, Appellant submitted an affidavit attaching an AppleCare Protection Plan Certificate confirming the purchase of the laptop, with serial numbers matching those of the device produced for examination. (R. 1518–19.) Although Appellant could not explain why some of the metadata in Abrams's forensic copy listed certain documents as originating in 2017, both Appellant and Abrams affirmed that the substance and content of those files were unquestionably created in 2013. (R. 1519.)

In a filing made that same day, Respondent accused Appellant of manipulating his electronic devices, thereby rendering meaningful examination impossible. (R. 1205.) He

renewed his claim that Appellant had submitted a "dummy" laptop to Abrams, while also advancing a new theory—that Appellant may have submitted his original computer but switched hard-drives out, or selectively deleted and re-downloaded data to manipulate its contents. (R. 1205 & 1207–09.) There was no evidence for either of these assertions.

The court denied Respondent's sanctions motion. In its January 18, 2024 order, the court found that Appellant had apparently complied with the April 28 directive by producing his 2013 laptop. (R. 85.) At this time, trial was set to begin on June 10, 2024.

But, on May 24, 2024—a mere 17 days before trial, Respondent advised Appellant that he intended to call an individual named Christopher Watkins as a testifying forensic expert with regard to Appellant's electronic devices. Respondent had not previously disclosed Watkins as a testifying expert, and Watkins had not yet provided an affidavit or report. Accordingly, that same day, Appellant filed a motion to strike Watkins as a witness, as well as a motion for partial summary judgment. The basis for summary judgment was simple: that despite a decade of litigation and extensive discovery, Respondent had failed to produce any evidence supporting his claims. (R. 1219.) The record showed that the allegedly defamatory statements were made by Shpetrik, and Shpetrik's deposition testimony confirmed that he was not acting as Appellant's agent when he made those statements. (R. 1405; see also R. 1480:14–1485:24.) Appellant acknowledged that he had encouraged Shpetrik to look into Respondent's background and criminal history, but maintained that he never directed or encouraged Shpetrik to publish any false or defamatory information. (R. 1405–06.) Accordingly, Appellant contended that summary judgment was warranted as to all of Respondent's claims.

Just 5 days after Appellant had filed his summary judgment motion—and only 12 days before trial—Respondent filed yet another motion seeking to strike Appellant's answer and place him in default. (R. 1221.) Respondent again argued that Appellant had failed to comply with the court's April 28, 2023 order, this time, by not producing his iPhone 5—despite the undisputed fact that a complete backup of the phone had been recovered from the laptop. (R. 1222.) Respondent also reiterated his argument that Appellant had destroyed evidence by engaging in a Telegram conversation with Shpetrik, even though the messages were auto-deleted through a feature enabled by Shpetrik. (R. 1221–22.) The centerpiece of Respondent's motion was an affidavit from his expert, Watkins, asserting that Appellant had "went to great lengths to destroy important evidence or secret it away." (R. 1222.)

As a result of Respondent's motion, Appellant was forced to retain his own forensic expert—Ian Finch—further prolonging the litigation and delaying trial. In a report and affidavit dated January 22, 2025, Finch found no signs that Appellant had tampered with his laptop or undertaken any intentional deletion. (R. 1244 & 1320.) Importantly, Finch explained why some files created in 2013 appeared to have 2017 dates. This was likely the result of Abrams using special software to copy the laptop's contents, which can sometimes change the dates of files during the copying process. (R. 1252.)

Despite Finch's opinions, Respondent persisted in seeking sanctions—his only viable path to prevailing in this litigation. In heavy reliance on Watkins' report, Respondent argued that sanctions were warranted because Appellant had either failed to preserve electronic evidence or had deliberately deleted it. (R. 1323.) His 2 central

arguments were: (1) that Appellant should be sanctioned for failing to preserve the Telegram conversation with Shpetrik; and (2) that sanctions were warranted based on Watkins's opinions.

As to Telegram, Appellant explained that the platform's auto-delete feature is controlled by the person who initiates the conversation, and the undisputed testimony was that Shpetrik—not Appellant—initiated the chat. (R. 1409.) Moreover, the Telegram exchange took place 10 years after the period during which Respondent claimed the alleged blackmail and defamation occurred. If the conversation were even relevant, its probative value would be slight, at best.

With respect to Watkins, Appellant pointed out that Watkins' examination did not substantiate any of Respondent's underlying allegations of defamation or blackmail. (R. 1410–11.) In fact, a digital backup of Appellant's iPhone 5—the very device that Respondent claimed had been withheld—was preserved on the laptop. (R. 1410.) Appellant also addressed the authenticity of the laptop, noting that the AppleCare Protection Plan Certificate he submitted included serial numbers that matched the device produced. (Id.)

Regarding the forensic examinations of his laptop, Appellant pointed out that 3 separate experts had reviewed the device, yet none could identify what, if anything, had been deleted, when it might have been deleted, or even whether deletion had occurred, at all. (R. 1410–11.) Finch's report, he noted, provided reasonable, technical explanations for the concerns raised in Watkins's analysis. (Id.) Ultimately, a substantial volume of data had been recovered from the laptop—and none of it contained evidence supporting Respondent's allegations of defamation, and certainly not blackmail. (R. 1411.)

On January 24, 2025, the court held a hearing to consider both Appellant's motion for summary judgment and Respondent's motion for sanctions. (See generally R. 219.) At the end of the hearing, the court mused that "none of this is nearly as clear as either one of you all act like it is." (R. 259:6-7.)

Nevertheless, on February 26, 2025, the court issued an order imposing sanctions that struck Appellant's answer and counterclaims, effectively placing him in default. (R. 94.) The order emphasized that Respondent had been seeking access to Appellant's devices for 10 years and still lacked access to Appellant's iPhone and to any devices that may have connected to his laptop. (R. 95.) The court attributed the prolonged delays in the case to what it described as Appellant's "extreme discovery abuse" and "violation of numerous court orders." (Id.) The order further accused Appellant of engaging in "legal wranglings, subterfuge, deceit, and destruction of evidence." (Id.) In reaching its decision, the court relied heavily on the affidavits submitted by Abrams and Watkins, both of whom believed that Appellant had intentionally tampered with his laptop's data. While the court acknowledged that Appellant's expert disputed those conclusions, it ultimately gave greater weight to Watkins' findings, though without explaining why. (R. 99–101.)

In detailing the specific conduct which merited extreme sanction, the February 26, 2025 order concluded that Appellant: (1) had not maintained the "integrity" of his devices after he received the 2013 preservation letter; (2) had not identified and produced electronic devices as required by the April 28, 2023 order; (3) had delayed production of his laptop after the order and had not produced his phone, at all; and (4) had engaged in "subterfuge" by communicating with Shpetrik through Telegram prior to his deposition.

(R. 102.) To the court, these circumstances established that Appellant had acted deceptively and in bad faith, and that Appellant had intentionally destroyed relevant information. (R. 104.) The court determined that only the most severe sanction—the striking of Appellant's pleadings—was appropriate. (R. 104–05.) Lesser sanctions, such as an adverse inference instruction, were deemed by the court to be merely a "tap on the hand." (R. 104.) This appeal followed.

ARGUMENT

This appeal challenges the trial court's decision to strike Appellant's answer and counterclaims as a discovery sanction—a decision that effectively ended the case without a trial on the merits. The record reveals no pattern of willful defiance or bad faith by Appellant, but rather a consistent effort to comply with complex and evolving discovery obligations in good faith. Appellant disclosed the devices he used during the relevant time period, produced his laptop to a neutral forensic expert, and even submitted additional devices not required by court order. A full digital copy of Appellant's iPhone was recovered, and no evidence was found to substantiate Respondent's underlying allegations of defamation or blackmail. Nevertheless, the trial court imposed the most severe sanction available, relying on speculative inferences of spoliation and conflicting expert reports. In doing so, the court failed to consider less drastic sanctions, did not identify any demonstrable prejudice to Respondent, and disregarded contrary forensic evidence submitted by Appellant.

South Carolina law requires that discovery sanctions be proportional, justified by actual prejudice, and imposed only after lesser alternatives are found inadequate. The trial court's sanctions order, by contrast, rested on contested evidence and speculative

assumptions, and was tantamount to a default judgment without sufficient cause. For these reasons, the sanctions order must be reversed, and the case remanded for adjudication on the merits.

A. Standard of Review

Decisions of the trial court imposing sanctions for discovery violations are subject to the abuse of discretion standard, meaning that such decisions will not be disturbed on appeal "unless no reasonable evidence supports them or they were imposed contrary to the correct law." See, e.g., Welch v. Advance Auto Parts, Inc., 2025 WL 1450573, *2 (S.C. Sup. Ct. May 21, 2025) (citing Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC, 445 S.C. 19, 28, 911 S.E.2d 406, 410 (2025)) (additional citations omitted).

B. Standards Specifically Pertinent to Sanctions that Strike Pleadings

In reviewing the propriety of an order imposing a discovery 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." Skywaves I Corp. v. BB&T, 423 S.C. 432, 457, 814 S.E.2d 643, 656 (Ct. App. 2018) (citing McNair v. Fairfield County, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct. App. 2008)) (additional citation omitted). "[T]he sanction should be a rifle-shot, not a shotgun blast," "aimed at the specific misconduct of the party sanctioned." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

Consistent with the prior decisions of this State's appellate courts, "[w]hen the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience, or gross indifference to its rights to justify the

sanction." Skywaves, 423 S.C. at 457, 665 S.E.2d at 657 (citation omitted). "Furthermore, whatever sanction is imposed should serve to protect the rights of discovery by the Rules of Civil Procedure." Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (citations omitted).

The undersigned has sought to identify all relevant decisions from this State's appellate courts addressing the striking of a party's pleading as a discovery sanction. The relevant South Carolina case law appears to consist of the following:

1. Balloon Plantation, 303 S.C. 152, 399 S.E.2d 439;
2. Karppi, 327 S.C. 538, 489 S.E.2d 679;
3. Halverson v. Yawn, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997);
4. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Manuf. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999);
5. QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004);
6. McNair, 379 S.C. 462, 665 S.E.2d 830;
7. Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014);
8. Skywaves, 423 S.C. 432, 814 S.E.2d 643;
9. Innovative Waste, 445 S.C. 19, 911 S.E.2d 406; and,
10. Welch, 2025 WL 1450573.

Appellant's review of the relevant case law reveals a consistent analytical framework used by courts to assess whether striking pleadings as a discovery sanction is proper. While this framework has not been expressly stated by appellate courts in this form, the following represents Appellant's effort to distill the guiding principles from the cited decisions into a unified analysis:

1. Whether the party appealing the sanction has violated a discovery order of the court;

2. Whether that party was expressly warned that a violation of the court's discovery order would result in the striking of its pleadings, or has otherwise disregarded prior orders of the court through which discovery sanctions were imposed;

3. Whether, in response to the court's discovery order, the party appealing the sanction has failed in substantial part to comply;

4. Whether the sanctioned-party's failure to comply with the court's discovery order was willful or deliberate (or otherwise demonstrates willful or deliberate indifference to the opposing party's discovery rights), or whether the sanctioned-party's failure to comply was justified; and,

5. Whether and to what extent the party seeking the sanction of a stricken pleading has been prejudiced by the sanctioned-party's conduct.

But this is not the end of the analysis. A trial judge may determine that striking a party's pleadings appears appropriate based on the preceding factors. However, the judge must then consider the potential prejudice to the sanctioned party. This evaluation may warrant a less severe sanction or justify limiting the scope of the sanction—such as by striking only a portion of the pleadings rather than all. The trial judge should also consider what form of sanction is sufficient, but not greater than necessary, to redress the discovery violation for which sanctions are sought.

C. Whether Appellant Has Violated a Discovery Order

The trial court held that Appellant violated two discovery orders, (see R. 94 & 78): first, a discovery order entered August 21, 2020,; and second, a discovery order entered March 28, 2022, (R. 31 & 51.). With sincere respect to the trial judge, this holding was error.

The discovery order entered August 21, 2020 held as follows:

> With regard to requests to produce seeking the production of electronic devices, [Appellant] may initially comply with the requests by providing a list of such devices. The parties are ordered to cooperate concerning the expeditious provision of such devices from the list as [Respondent] may select for examination by [Respondent] or such persons as he may choose.

(R. 32 at ¶ 1(d).)

The trial court has twice held that Appellant violated this provision. (R. 82 & 104.) And as a factual matter, the court was incorrect.

The first sentence of the foregoing provision states that Appellant "may initially comply with [Respondent's] requests [for production] by providing a list of [electronic] devices" that would have been used by Appellant during or about 2013—the year in which the events giving rise to Respondent's claim were alleged to have occurred. In direct response to this order, Appellant disclosed two electronic devices: (1) a 2013 MacBook Pro; and (2) an iPhone 5. (See R. 52.) At the time, Appellant mistakenly believed that he had transferred the contents of the MacBook to another device as part of a routine upgrade, unaware that he still possessed the original laptop. He also stated that he had traded in his iPhone 5 during successive upgrades, as is common with mobile phone users. Critically, the first forensic examiner, Abrams, later discovered that the MacBook still contained its original data and, remarkably, included a complete backup of the iPhone 5. In short, the August 2020 order required Appellant to identify the devices he used in 2013, and he complied.

The second sentence of the August 2020 order quoted above requires the "parties to cooperate concerning the expeditious provision of such devices" to Respondent or a person of Respondent's choosing (such as a forensic examiner). But this itself was problematic. The August 21 order did not establish any safeguards whatsoever for the

protection of Appellant's legitimate privacy interests and privilege rights. If any data repository contained information about Appellant's business interests, that was subject to production; if they contained matters about Appellant's personal health, or correspondence between Appellant and his spouse, that was subject to production; if they contained communications between Appellant and his lawyers, that was subject to production. In short, the August 2020 order did not establish any parameters for the protection of Appellant's legitimate privacy interests, and that was improper.

To be certain, it is the rare litigant who has no complaints about having to produce his or her electronic devices for data examination. It is inconvenient and invasive.

But Appellant's concerns were amplified by the circumstances of this case. It cannot be forgotten that Respondent had already—by the time of the August 2020 order—published multiple inflammatory articles about Appellant on Respondent's fake-news website. Appellant was legitimately concerned that, if Respondent had unfettered access to information found on Appellant's electronic devices, Respondent would weaponize that information, publish it on his online rag, and humiliate Appellant. Consequently, in the wake of the August 2020 decision, counsel for the parties could not come to an agreement as to what protective protocols could be established with respect to the data to be taken from Appellant's electronic devices.

However, by order dated March 2022, the trial court directed Appellant to make the MacBook and the iPhone 5 available for a forensic examination (even though, at that time, Appellant did not believe he was still in possession of data from the iPhone). (R. 51.) The March 28 order attempted to establish protections for Appellant's data, but it was literally impossible for Appellant to comply with its terms.

The amount of data contained on Appellant's MacBook exceeded a terabyte. (R. 642.) A terabyte of data is roughly the equivalent of 75 million printed pages. (Id.)

The trial court's March 2022 order gave Appellant 21 days from the date of the order to review the contents of the MacBook for privilege. Under Rule 26(b)(5), if Appellant were to withhold any information based on privilege, Appellant's counsel would be obligated to review any information withheld to meet his duty to see that the assertions of privilege were made in good faith; counsel would also need to prepare a privilege log. Consequently, for a terabyte of information:

1. Assuming that the undersigned could review and catalog two pages per minute, it would take 625,000 hours to review all documents. At 8 hours per day, for 261 working days per year (taking weekends off but no holidays), the review would take almost 300 years;

2. Assuming the same rate of review, it would take an army of 1240 lawyers working every hour of every day for 21 days to meet the court's deadline;

3. The average hourly rate for civil litigation attorneys in South Carolina is around $250.00. The cost to Appellant just to comply with the trial court's order would be $156,250,000. Even if Appellant were to have hired an army of paralegals instead of lawyers to conduct the review, the cost would still have been more than $60,000,000.

And that's just for privileged material. It is also necessary under the terms of the March 2022 order for Appellant to conduct a review for information that is confidential; in fact, under the terms of the order, the only way for non-privileged information to be protected from public dissemination was for specific documents to be marked "CONFIDENTIAL," and only after a review "by an attorney who has, in good faith, determined that the documents contain information protected from disclosure." (R. 55 at ¶ 8.) Therefore, even if Appellant were to have tried to comply with the March 2022 order by providing Respondent with a list of keywords to find privileged information, to protect information

that was otherwise private, sensitive, or confidential, Appellant would still have had to incur tens-of-millions-of-dollars in legal expense just to exercise his basic privacy rights against a litigation opponent who had already established a history of defaming Appellant on the most public of all forums.

These very problems were presented to the trial court through a Rule 59 motion. But the court declined to amend its order.

These are the circumstances that led Appellant to try to take an immediate appeal to this Court. In doing so, Appellant was mindful of the precedents which establish when a discovery order is sufficiently final to become appealable. But Appellant was presented with an exceptional circumstance: a discovery order that could not be complied with. In what appears to be all other South Carolina cases addressing the appealability of discovery orders, the aggrieved party has always had the ability to choose whether to comply or go into contempt. Appellant did not have that choice. It was under these exceptional circumstances that Appellant sought relief for the first time from this Court, hopeful that the Court would intervene to protect Appellant from the immediate, irreparable harm of a discovery order that Appellant—as a matter of reality—could not comply with. However, this Court declined jurisdiction, and the case was remanded.

Consequently, Appellant found himself back before the trial court, at which time the court entered the April 2023 order threatening to impose sanctions. In this order, the court held that Appellant had violated the August 2020 discovery order, which was not accurate. The court further held that Appellant had violated the March 2022 discovery order, which was also not accurate. The court then made reference to the first appeal taken by Appellant, insinuating that the attempt was for no purpose other than delay,

which was not true. Regardless, with this view of the circumstances, the court imposed a conditional sanction on Appellant: unless Appellant were to "fully comply" with the discovery orders of August 2020 and April 2022 within 45 days, Appellant's answer and counterclaim would be stricken, and he would be subjected to a fine.

Appellant was therefore thrust into an impossible position: he could either continue seeking to protect his privacy interests and privilege rights by refusing to produce his electronic devices without any meaningful ability to designate information as privileged, or sensitive, or confidential, but this would result in his answer and counterclaim being stricken, being held in default, and being held liable for civil wrongs that he did not commit; or he could place his privacy interests in jeopardy, tender his devices, and hope for the best. Appellant chose the latter.

In the summer of 2023, Appellant sent 2 devices to the designated forensic examiner—Steve Abrams: one device was Appellant's 2013 MacBook Pro; the other device was a newer MacBook that had been used exclusively by Appellant's spouse and had no relevance to this case. (R. 1146 at ¶ 5.) Appellant made his wife's MacBook available for inspection simply to assuage any suggestion that he had somehow concealed any of the wrongful activities he had been accused of by using her device. Abrams did not find any information of relevance on the device of Appellant's wife, which was not unexpected.

With respect to Appellant's MacBook, though, there were two items of note. First, as referenced previously, Abrams was able to identify a set of data from an iPhone 5 that had been backed up to Appellant's device in 2013. (R. 1147 at ¶ 9.) From this, Abrams was able to recover "over 200,000 messages, many related to this case from the phone."

(Id.) This led Abrams to conclude that, with respect to the unavailability of the mobile device that Appellant was using in 2013, "I think the issue of the iPhone 5 may be resolved." (Id.)

The second matter of note regarding Appellant's MacBook was the forensic examiner's ability to follow the data capture-and-protection protocol that had been ordered by the trial court. To quote Abrams:

> The Order issued by Judge Kinlaw had explicit methods to be employed to make a physical image of [Appellant's] computer and then to knock out any privileged data. This method works well on older unencrypted hard drives, especially from Microsoft Windows based machines. It is wholly inapplicable to whole disk encrypted hard drives, especially with virtual machines, such as this MacBook. We could not follow the recipe set forth in the Order. Mr. Johnson and I took two different approaches to get [Appellant's] data given the realities of what we had to work with.

(R. 1146 at ¶ 7.)

It was at this point that Abrams did what the trial court should have done: not only did Abrams ask Appellant's counsel for information by which potentially privileged material could be segregated, Abrams also asked Respondent's counsel for key words and search terms that could be used to pare down the volume of information available, to separate information that was potentially relevant from information that was likely not. (R. 1147–48 at ¶ 10.)

The practical impact of Abrams asking Respondent's counsel to identify his own search terms—which was something Appellant had previously asked the trial court to order—was staggeringly effective. Abrams found 4 million files on Appellant's MacBook. (Id.) Of those 4 million files, 24,000 suggested privilege. Under the trial court's forensic protocol, Appellant's counsel would have had to review all 24,000 files for privilege, and then review the balance of 4 million files for relevance, or sensitive or

confidential material—and all within 21 days. However, by using search terms provided by Respondent, Abrams was able to identify—out of 4 million files—only 9235 files that contained potentially relevant information. (Id.) This number was further reduced by removing any files that overlapped with files implicating privileged material, and even further reduced by removing duplicates of the same files. (Id.) What was left was a small subset of non-privileged, potentially relevant documents that could be reviewed relatively quickly to identify any discrete confidential or sensitive material that may need to have been withheld or redacted. That subset of non-privileged, potentially relevant documents was ultimately provided by Abrams to Respondent.

The results of Abrams' inspection were detailed in a supplemental affidavit that was filed with the trial court. (R. 1161.) Abrams found no evidence on Appellant's computer that Appellant had ever gone by the pseudonym "Rick Rollinski," or that Appellant had ever participated in a cryptocurrency-blackmail scheme against Respondent. (R. 1165 at ¶ 10.) Abrams did find evidence that Appellant had shared a link from a website known as "performoutsider.com" with others, in which that website referred to Respondent's status as a sexual offender. (Id. at ¶ 12.) But it is well-established that the posts on "performoutsider.com" were made by Shpetrik. (R. 1477.) Abrams found additional information on Appellant's computer in which others—including the Florida state attorney who prosecuted Respondent on his sexual assault charges, which secured convictions—referred to the victims of Respondent's conduct as "minors." (R. 1161, 1413 & 1473.) But Abrams found no evidence on Appellant's computer that Appellant had ever called Respondent a pedophile. And, importantly, all

the information that Abrams found on Appellant's computer had already—years earlier—been produced, both in this and other litigation.

Regrettably, though, Abrams' supplemental affidavit introduced a new issue into the case that Appellant had to deal with: whether the MacBook that Appellant produced for inspection was, in fact, the MacBook that Appellant was using in 2013, or whether Appellant had produced a different MacBook, or the same MacBook with a different hard drive. (R. 1162–63 at ¶ 4.) This was a frustrating and baseless distraction. On December 13, 2023, Appellant filed an affidavit with the trial court demonstrating that the serial number referenced on the MacBook produced for inspection was the same as the serial number on the receipt, from 2013, for the purchase of the laptop. (R. 1198–99 at ¶ 4.) Fortunately, this issue was put to rest by an order of the trial court denying Respondent's request for sanctions, which Respondent sought based on Abrams' suggestion that the computer Appellant had produced had been manipulated or switched. (R. 85.)

In the meantime, however, Respondent had engaged Watkins as his own independent forensic analyst. Watkins ostensibly did not join in Abrams' suggestion that Appellant's computer had been switched for a "dummy." But he did opine that certain data on the computer regarding internet browser history and administrative commands appeared to have been deleted, though he could not render an opinion with any degree of certainty as to whether the deletions were intentional, or when they may have occurred. (R. 1223.)

To address these concerns, Appellant engaged his own forensic examiner—Finch—who has special expertise with Apple devices. Finch explained that Apple devices, and more specifically, Apple Safari and Google Chrome web-browsers, have

built-in data retention limits that automatically remove older internet history. (R. 1321 at ¶ 7(3).) Finch also explained that, whatever administrative commands were deleted, a record of any such commands would exist in a separate log that remained on Appellant's computer, and that log did not indicate the deletion of any administrative elements. (Id. at ¶ 7(4).) Finch's primary conclusion was that there was "no evidence indicating the data on the computer had been tampered with, or wiped, as described by Mr. Abrams and Mr. Watkins." (Id. at ¶ 7(1).)

These were the facts and circumstances before the trial court on Respondent's motion to strike Appellant's pleadings, which gave rise to the order of February 26, 2025. That order identifies 4 bases for imposing the sanction of striking Appellant's answer and counterclaim, which Appellant will address in turn.

First, the trial court held that Appellant had not "maintain[ed] the integrity of his devices after receiving the letter of December 20, 2013, discovery requests and Court Orders relating to these devices." (R. 102.) According to this conclusion, Appellant was sanctioned because he failed to preserve electronic data going back—at the time of the sanctions order—12 years. It seems the trial court gave no regard to the provisions of Rule 37(f), SCRCP, which explicitly provide that, "[a]bsent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Yet that is exactly what the trial court seems to have done. There is no evidence to establish that Appellant deliberately deleted any data from his MacBook. And any insinuation of such deletion was refuted by the "very comprehensive report" provided by Finch. (R. 100.) However, the trial court seems to

have concluded, without any evidentiary foundation, that Appellant did engage in deliberate deletion:

> Based on the record, the Court cannot determine at what point this data was removed or destroyed, but clearly it was after [Appellant] was aware that [Respondent] intended to pursue him for this matter based on the demand letter sent in December, 2013. . . . After much deliberation, the Court finds that the Defendant has willfully destroyed or removed relevant and material evidence, which most likely occurred after discovery had been presented to him and after he was Ordered by the Court to do so. . . . Even though the timing cannot be determined, the Court finds that [Appellant's] actions were clearly done with the goal of destroying the evidence and making sure it was not discoverable. Further, even though some of the conduct may have occurred prior to the issuance of these Orders or discovery submitted, it was after the letter of December 20, 2013 and at no time[] has [Appellant] admitted and explained the circumstances for which the evidence was removed or destroyed.

(R. 100-02.)

With sincere respect to the trial court, there is simply no evidence to sustain these assertions. As a practical matter, if Appellant were trying to hide information from discovery, it would make no sense that Appellant would have kept the very computer that allegedly had inculpatory material. This is especially true in light of the volume of data that Abrams recovered. As discussed above, Abrams found more than 9000 files on Appellant's computer that were potentially relevant to this dispute. Somehow though, according to the trial court's reasoning, Appellant managed to surgically delete only files that evidenced him calling Respondent a pedophile, or orchestrating a blackmail conspiracy against Respondent, leaving 9000 other files on his computer relating to Respondent. There is no evidence to support this theory. Certainly, nothing inculpatory was found on Appellant's MacBook or iPhone. But just as importantly, nothing that would implicate Appellant in blackmail and defamation has been identified from any other source or witness. Ever. In 10 years of litigation.

This leads to a particularly frustrating passage of the trial court's decision:

> Even though [Appellant] argues that [Respondent] has not established that [Appellant] destroyed any data or disposed of any devices since the issuance of the Court's Order, [Appellant] cannot defend the fact that after over ten years, letters, discovery and Orders to Compel have been issued, he has not produced any of the requested information regardless of the reason, or any real explanation of why it has not been produced nor the identity of the devices which he used during the relevant time periods.

(R. 101.)

Neither Appellant, nor any of the greatest mathematicians and philosophers in human history, have ever been in a position to prove a negative. The law does not require those accused of wrongful conduct to do so. Yet, on the battleground of electronic discovery, the trial court has ostensibly held that Appellant has the burden of proving that he did not engage in defamation or blackmail, and has found the absence of inculpatory information on Appellant's electronic devices to be conclusive proof that Appellant did the very things he's accused of. Under these standards, it is fair to question how Appellant could ever possibly demonstrate to the trial court's satisfaction that no evidence implicating Appellant in blackmailing or defaming Respondent ever existed on his devices.

Appellant has now had 3 forensic examiners scouring his MacBook. Not one has found evidence of Appellant blackmailing or defaming Respondent; not one has found evidence that any aspect of so-called altered or deleted data related to blackmail or defamation; not one has found any reliable indication of when such so-called altered or deleted data occurred. This leaves two possibilities: either Appellant is a prodigy in computer science, capable of manipulating electronic devices without leaving behind any fingerprint capable of detection by multiple other computer science and forensics

professionals; or, very simply, the evidence that Respondent claims should exist on Appellant's computer never did. Occam's Razor should guide us swiftly to the answer.

But perhaps the most frustrating aspect of the trial court's decision is that the contents of the order fail to square with its conclusion. The trial court spends 3 pages discussing how it has become convinced that Appellant deliberately destroyed data on his MacBook, but then concludes that Appellant's discovery violation consists of failing to maintain the integrity of his devices during the pendency of litigation. *Which is it?* If the sanction is predicated on deliberate destruction of discoverable information, there is no evidence to support that conclusion; if the sanction is predicated on mere failure to preserve, there is no evidence of "exceptional circumstances," as contemplated by Rule 37(f), to justify the imposition of sanctions on Appellant—much less the civil death penalty. And, importantly, the undersigned's research has not yielded any case from South Carolina's appellate courts upholding the sanction of striking a party's pleading for a mere failure to preserve electronic data.

Returning to the holding of the trial court's February 2025 order imposing sanctions, the second basis advanced by the decision for striking Appellant's pleadings is for Appellant's failure to identify and produce "other devices which he used and were subject to the discovery requests and Court Orders, including the iPhone and the device(s) accessed remotely as identified in Watkins affidavit." (R. 102.)

Again, with sincere respect to the trial court, this conclusion is factually incorrect. Certainly, during or about 2020, Appellant thought that he was no longer in possession of the iPhone 5 he was using in 2013. And, with respect to the actual, physical iPhone, Appellant was correct; that phone was traded in much earlier as part of a routine upgrade.

But the data from the phone remains; it was found entirely intact as a backup file on Appellant's computer. And, as for the contention that Appellant has failed to account for external devices that were connected to his computer "as identified in Watkins affidavit," (Id.), it would seem that the trial court neglected the explanation set out in Finch's affidavit on this very point. In his statement and associated report, Finch explains why, it appears, Abrams' data preservation process "added and/or changed data and artifacts on [Appellant's] MacBook," indicating the connection of an external device in 2017, when in fact, the external device at issue was connected by Abrams in 2023. (R. 1321 at ¶ 7(5).)

The third basis for the trial court's sanctions order is based on Appellant's consent to produce his electronic devices, but the delay then occasioned by Appellant's subsequent motions and attempted appeal. (R. 102.) All of this, as discussed at length above, was a direct result of the parties' profound disagreement regarding the data protection protocols that would be employed, and then, the trial court's institution of a protocol that was literally impossible to comply with.

The fourth and final basis for the trial court's sanctions decision is the contention that Appellant "engaged in further subterfuge by communicating with a material witness [Shpetrik] before his deposition through a platform [Telegram] which automatically destroyed the communication just after it was received, thus eliminating the ability to access this information in discovery, consistent with his other actions throughout this case." (R. 102.) As explained above, one of Telegram's features is that the party initiating a conversation can set the parameters for how long the conversation will be preserved. The undisputed evidence is that Shpetrik initiated a conversation on Telegram

with Appellant in which Shpetrik was complaining about Respondent "wasting time and money" with these lawsuits. (R. 1408.) The conversation ended shortly thereafter, at which point the conversation thread was deleted, according to the auto-deletion preference that Shpetrik—not Appellant—had established. The undersigned is not aware of any authority to suggest that a party may be sanctioned for failing to preserve information that is not within his possession, custody, or control.

The larger purpose of this argument section was to examine whether there was a discovery order that Appellant has violated. Appellant is mindful of the trial court's determination that Appellant has violated the discovery order of August 21, 2020. However, as explained above, that order required Appellant to disclose the electronic devices that Appellant was using during the 2013 timeframe. Appellant did so. The order further required the parties "to cooperate" concerning the provision of those devices to Respondent or his designee. The parties tried but could not come to an agreement that provided Appellant with sufficient protection for his legitimate privacy interests and privilege rights. This dispute required further involvement with the court, which resulted in the discovery order of March 28, 2022 that Appellant literally could not comply with.

Regardless, when the trial court issued its discovery order of April 28, 2023, instructing Appellant to provide his electronic devices within 45 days for forensic examination or have his pleadings stricken, but all under strict assurances of severe sanctions that would be imposed against Respondent for abuse, Appellant complied—with great trepidation; but Appellant complied. This resulted in Respondent having access to all relevant, non-privileged information from Appellant's MacBook and iPhone, which is the very information Respondent sought.

In short, Appellant has complied with all discovery orders that have been issued. Appellant did so despite the clear and present threats to his legitimate privacy interests and privilege rights, specifically in order to avoid his pleadings being stricken. But his pleadings were stricken anyway. And the undersigned is not aware of any South Carolina decision upholding the decision of a trial court to strike a party's pleading as a discovery sanction after the party has complied with the discovery ordered. See, e.g., Balloon Plantation, 303 S.C. 152, 399 S.E.2d 439 (reversing trial court's sanctions order striking a pleading where party complied with discovery order).

D. Whether Appellant Was Expressly Warned or Disregarded Prior Orders

As referenced above, of all the discovery orders that have been issued in this case, only one has expressly warned Appellant that his pleadings may be stricken as a discovery sanction. That order was the trial court's decision of April 28, 2023, and it provided that Appellant's answer and counterclaim would be stricken if Appellant did not produce his MacBook and iPhone for inspection within 45 days. Appellant did so.

No other orders in this case have imposed discovery sanctions on Appellant; accordingly, Appellant is not in default as to any other discovery sanctions that have been imposed—because none were imposed. And it cannot be fairly said that Appellant has established a pattern of failing to comply with the trial court's discovery orders.

E. Whether Appellant Has Failed to Comply Despite Being Warned

This, too, has been addressed above and at length. After the trial court's order of April 2023, it became apparent that there were no further opportunities to establish reasonable, practicable protections around the disclosure of Appellant's confidential, sensitive, or privileged electronic data. Appellant had specifically advised the trial court

of the actual impossibility of complying with the March 2022 discovery order in a way that would protect him from the palpable threats to his privacy that Respondent presented, but the court was unmoved. These concerns were raised through an interlocutory appeal to this Court, but jurisdiction was declined. And so, when Appellant was back before the trial court on a motion for sanctions in the early part of 2023, Appellant was forced to choose between the least bad of two bad options: (1) refuse to comply with the April 2023 order threatening sanctions, which would have resulted in the striking of his pleadings, being held in default, and being deemed liable for wrongful acts that Appellant has consistently denied; or (2) make his electronic data available for inspection, knowing that—under the deadlines imposed by the trial court's March 2022 order—there was no realistic way that Appellant's sensitive, confidential, private, or privileged information could be withheld from disclosure from a person who had a demonstrated history of publicly embarrassing Appellant on a fake-news website.

Appellant complied. Yet, on a factual basis that was disputed among 3 forensic examiners, the trial court deemed Appellant's compliance insufficient and struck his pleadings anyway. Again, to the best of the undersigned's research, there does not seem to be an appellate decision issued by the courts of this State that affirms a trial court's decision to strike a party's pleadings where the question of whether the party has complied with the pertinent discovery order is subject to a genuine dispute.

F. Whether Appellant's Discovery Conduct Was Wrongful or Justified

One of the significant factors appearing from the South Carolina decisions regarding the propriety of striking a party's pleadings as a discovery sanction is whether the sanctioned-party's conduct in response to a discovery order threatening sanctions was

justified. Generally, this analytical element is framed as whether the conduct demonstrates a willful disregard for the directives of the underlying discovery order, or deliberate indifference to those directives.

There is no evidence that Appellant ever ignored the trial court's discovery orders. There is no evidence that Appellant ever took a cavalier position as to whether he would comply with the court's discovery orders. Consider the following timeline:

1. On August 21, 2020, while the case was suspended under Rule 40(j), the parties entered into a consent order in which Appellant would identify electronic devices he had been using 7 years earlier. And Appellant did so.

2. After Appellant identified the pertinent electronic devices, a dispute arose between the parties as to the protections that Appellant's data would be afforded under a forensic protocol. It was Respondent's position that Appellant's data would not be subject to any protections, and this necessitated judicial intervention, which was delayed because of the case's status under Rule 40(j).

3. This led to the trial court's discovery order of March 2022, which established the forensic protocol that Appellant could not, as a matter of practical fact, comply with and have any hope of protection for his private, confidential, sensitive, or privileged information.

4. After Appellant had exhausted every avenue—even those of remote probability—to seek relief from the impossible position that he was forced into by the March 2022 order, and in direct response to the trial court's discovery order of April 2023 threatening to strike Appellant's pleading, Appellant produced his MacBook for forensic inspection, through which the contents of his iPhone were recovered, and also produced his wife's laptop—even though it had nothing whatsoever to do with this case.

As discussed elsewhere above, this State's decisions affirming a trial court's decision to strike pleadings have been uniformly based on a party's decision to thwart the court's authority in responding to discovery, whether by failing to respond to discovery even after being expressly ordered, or by deliberately destroying information after its production has been ordered. See, e.g., Welch v. Advance Auto Parts, Inc., 2025 WL

1450573 (S.C. May 21, 2025); QZO v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (2004). There is no case which even by a whisper suggests that a party's failure to preserve all data on an electronic device that was used 10 years earlier is capable of supporting the most drastic civil sanction, particularly when there is no clear evidence as to when the data was lost, how it was lost, what the substance of the lost data was, or whether any person was responsible for causing the data to be lost. To warrant the sanction of striking a party's pleading, there must be evidence of that party having acted in obvious derogation of the court's authority. And there are no such circumstances in the instant case.

G. Whether and to What Extent Respondent Has Been Prejudiced

Each of the South Carolina appellate decisions regarding the striking of a party's pleading as a discovery sanction involve the court's consideration of whether and to what extent the party moving for sanctions has been prejudiced by the conduct. In the instant case, Respondent would be hard-pressed to identify any real prejudice arising from Appellant's efforts to protect his legitimate privacy interests and privilege rights.

First of all, it is indisputable that Respondent's conduct has made Appellant fear for the security of his private, confidential, privileged, and sensitive information. Certainly, in every case involving invasive electronic discovery, the party required to produce their electronic devices for inspection has a generalized fear about their private files and communications coming to light. But Appellant's fear was not generalized. Respondent had already, on several occasions, published inflammatory articles about Appellant on Respondent's fake-news website. Perhaps, if Respondent had wished for a

less complicated course of discovery in the underlying litigation, he should have refrained from maligning Appellant on the internet.

Second, Respondent could not seriously contend that he was prejudiced by the delay in getting access to Appellant's electronic devices. The trial court's February 2025 sanctions order seems to put a great deal of weight on the fact that, in December 2013, Respondent's counsel sent a preservation letter to Appellant. Yet Respondent's counsel never sought a forensic inspection of Appellant's electronic devices until—for the first time—in March 2018. At that time, it might have been a minor miracle that Appellant would still be in possession of the data sought; it's a miracle on the scale of Lourdes that, in 2023, the data from a computer and phone that Appellant used in 2013 was still available for inspection.

Third, and critically, there is an absence of material evidence from the data recovered substantiating any of Respondent's claims. There was no evidence that Appellant had engaged in the wrongful acts that Respondent has attributed to him, and there was no evidence that Appellant had deleted or destroyed evidence from which it may be fairly inferred that Appellant was responsible for such wrongful acts.

Fourth, there is no credible argument that Appellant's reluctance in producing his electronic devices for inspection caused any material delay in the trial of this matter. This assertion is evidenced by the delays of the trial of this matter attributable to Respondent, as evidenced by the following timeline:

1. Respondent filed his initial complaint on August 8, 2014.

2. On December 1, 2015, Respondent filed a motion to stay this litigation in favor of allowing other federal litigation to proceed. That stay was lifted on August 16, 2016.

3. On January 17, 2019, Respondent filed a notice of appeal with this Court as to 4 separate interlocutory orders of the trial court. However, Respondent later voluntarily withdrew his appeal, and those appellate proceedings were terminated by order of this Court dated July 15, 2019.

4. On October 26, 2020, an order of dismissal was entered pursuant to Rule 40(j), SCRCP. The case was not restored to the active docket until July 15, 2021.

5. On May 17, 2022, Appellant filed a notice of appeal with this Court arising from the discovery orders that were literally impossible to comply with and which presented Appellant with a substantial risk of being forced to divulge personal, privileged, confidential, and sensitive information, most of which being utterly irrelevant to the litigation, to Respondent, who himself had already established a track-record of humiliating Appellant through Respondent's fake-news website.

6. On March 22, 2023, Appellant filed a motion with the trial court to schedule trial. As a result of this motion, trial was set to begin on June 10, 2024.

7. In June 2023, Appellant produced his electronic devices for forensic inspection.

8. By order dated January 18, 2024, the trial court denied Respondent's motion for sanctions against Appellant for discovery violations.

9. On May 24, 2024—just 17 days before trial was to commence—Respondent, through counsel, indicated his intent to designate a testifying expert who had not yet even provided a report. This led the undersigned to immediately file a motion to exclude such individual as a testifying witness. The trial court denied Appellant's motion and instead continued the trial date. To be clear, this postponement was a direct result of Respondent's late-stage discovery gambit.

10. Trial had been rescheduled to occur during March 2025, but that was obviated by the lower court's decision to strike Appellant's pleadings, from which this appeal is taken.

As evidenced by this timeline, if Respondent should complain about the prejudice he has sustained by the deprivation of a speedy trial, perhaps he may also explain how this can be the case in light of the 2 years of delays attributable to him. In any event, it is not fair or equitable to apportion all, or even most, of the responsibility for the delays in

adjudicating this case to Appellant. In fact, the only party that has ever expressly asked the lower court for a trial date is Appellant, and that date-certain was thwarted by Respondent's own discovery misconduct.

H. The Decision to Impose Sanctions

Even if the trial court believed that striking Appellant's pleadings was warranted, the analysis should not have ended there. Courts have repeatedly emphasized that discovery sanctions must be narrowly tailored—a "rifle shot," not a "shotgun blast" or a "hydrogen bomb," as striking a pleading often is. In other words, and to borrow from federal sentencing principles, the sanction must be sufficient—but not greater than necessary—to address deliberate misconduct that has caused actual prejudice. Thus, even when the court determines that severe sanctions may be justified, it must still evaluate whether a less drastic alternative may suffice.

I. Whether and to What Extent Appellant Will Be Prejudiced

One circumstance that our courts have previously considered is whether it is appropriate to strike the entirety of the sanctioned-party's pleadings when that sanction would result in the dismissal of that party's affirmative counterclaims. See, e.g., Karppi, 327 S.C. 538, 489 S.E.2d 679 (finding an abuse of discretion where sanctions order dismissed counterclaim, providing a windfall to the opposing party).

But even if it were merely Appellant's answer that was stricken—leaving his counterclaim intact—Appellant would still be prejudiced. Appellant has a meritorious defense: he did not defame or blackmail Respondent. In 10 years of litigation, in multiple lawsuits among several jurisdictions and numerous rounds of discovery, Respondent has

never found a single fact or witness who can support the allegation that Appellant tried to blackmail Respondent or that Appellant called him a pedophile. Not one.

The record is replete with examples of Respondent trying to win his case on procedure. The reason is obvious: Respondent cannot win on the merits. It would be manifestly unjust to allow a party who does not have a good-faith basis to have brought the claims he has against Appellant—who never had a good-faith basis for those claims—to win by forfeit, all because Respondent couldn't find evidence of guilt on Appellant's electronic devices, particularly since those devices never contained such evidence in the first place.

J. Whether Striking Appellant's Pleadings Is Necessary

There are a range of discovery sanctions available to trial courts, ranging from financial penalties, to adverse-inference instructions, to having pleadings stricken and parties being held in contempt. In the instant case, the trial court apparently considered giving the jury an adverse-inference instruction, but decided that sanction was too light, favoring instead a finding that Appellant was in contempt, and striking his pleading, and imposing a financial penalty. Again, with most sincere respect to the trial judge, the magnitude of this sanction is disproportionate to the circumstances. See e.g., Karppi, 327 S.C. at 549, 489 S.E.2d at 685 (Anderson, J. concurring) ("Denying a party the opportunity to be heard should be carefully invoked and reserved for the most egregious cases."). There was a genuine dispute among 3 forensic professionals whether potentially relevant information had been lost from Appellant's devices, whether that loss was caused by deliberate action, and when that loss—if any—may have occurred. At worst, these questions should have been resolved by the jury after testimony from those experts,

not decided by the trial court, on paper, to direct a verdict for Respondent through an ostensible discovery violation on a case of specious merit.

K. Summary of Appellant's Position under This Analytical Framework

Appellant did not violate any discovery order of the trial court that threatened striking Appellant's pleadings for non-compliance. The only order that threatened discovery sanctions was the order of April 28, 2023, which required Appellant to produce his MacBook and iPhone for forensic inspection, and with which Appellant complied. Accordingly, it was an abuse of discretion for the trial court to find that Appellant had engaged in a pattern of discovery abuse.

In that same connection, it was an abuse of discretion for the trial court to conclude that Appellant had failed to preserve electronic data. Three forensic experts disagreed about whether any data was lost, when it may have been lost, and how it might have been lost—whether through mere inattention or deliberate destruction. Moreover, no expert rendered an opinion as to whether the electronic information that was lost—if any—was relevant or material the litigation. This is particularly important under the circumstances presented here, where the first time that Respondent ever suggested a need to engage in a forensic inspection of Appellant's electronic devices was 5 years after the events allegedly giving rise to his claim.

It was also an abuse of discretion for the trial court to conclude that Appellant should be sanctioned for failing to preserve a brief Telegram exchange with Shpetrik. The undisputed testimony was that Shpetrik initiated the conversation, and did so under circumstances that resulted in the auto-deletion of the conversation upon its conclusion—without any ability of Appellant to change the deletion protocol.

Even if Appellant's objections to the trial court's orders could be fairly characterized as discovery violations, it was an abuse of discretion for the trial court to conclude that Appellant's conduct was malicious or grossly indifferent to Respondent's legitimate discovery interests. Appellant has consistently expressed his concerns that, without appropriate protections for his legitimate privacy interests, Respondent would publicize information about Appellant on Respondent's fake-news website, particularly if the information could humiliate Appellant. These concerns were not hypothetical. Respondent had already done it before and on multiple occasions.

The trial court's order of March 2022 attempted to impose protective protocols to ease Appellant's concerns, but did so by imposing a protocol that Appellant literally could not comply with in good faith, with fidelity to the Rules of Civil Procedure, while also protecting his own legitimate privacy interests.

The record is abundantly clear: Appellant's conduct in responding to the various orders regarding electronic discovery was not borne out of disregard for the trial court's authority or disdain for Respondent's discovery rights; it was the direct result of having to submit to an invasive search of his electronic devices under circumstances where there was a high probability that Respondent would use any information he could gather from discovery—regardless of whether that information was relevant to the dispute, and regardless of whether it comprised private, sensitive, confidential, or privileged information—to malign Appellant, and further, under circumstances where the protective protocol established by the court offered little protection, at all.

Ultimately, Appellant produced his electronic devices for forensic examination. And because of the volume of data involved, the first forensic examiner did what the trial

court should have done, and which Appellant urged the trial court to do: require Respondent to provide a list of key words and search terms. This simple exercise yielded a far smaller subset of potentially relevant information, which was then more easily sanitized for privilege and privacy interests.

As a consequence of this exercise, Respondent gained access to any potentially relevant information that might have been located on Appellant's electronic devices. And importantly, none of the information retrieved from Appellant's devices substantiated any of Respondent's claims. These searches were, of course, performed a decade after the circumstances giving rise to the claim sued upon; but it cannot be forgotten that Respondent didn't begin suggesting that a forensic examination of Appellant's electronic devices was appropriate until 5 years after that time, and a search was performed only after years of litigation delay for which Respondent was responsible for causing.

In light of the foregoing circumstances, it was an abuse of discretion for the trial court to conclude that striking Appellant's pleadings was an appropriate discovery sanction. The undersigned has little doubt that the trial court had lost patience with this litigation. But the court's frustration with a litigant, or with the litigation itself, is not an appropriate factor for determining whether to impose the civil death penalty. See, e.g., Karppi, 327 S.C. 538, 489 S.E.2d 679.

This is particularly true where, as here, Appellant has a meritorious defense to Respondent's claims, and further, Respondent has realized a substantial windfall against Appellant with the summary dismissal of his counterclaim, for defamation, of which there is ample evidence of merit. Id.

For all these reasons, and again, with sincere respect to the trial court, it was an abuse of discretion for the trial court to strike Appellant's answer and counterclaim. And, consistent with the precedents of this Court and the Supreme Court regarding discovery sanctions, the "hydrogen bomb" sanction that the trial court dropped on Appellant's legitimate privacy rights and litigation interests must be vacated.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, and for any additional reason that may appear from the record, Appellant respectfully requests the entry of a decision from this Court which reverses the trial court on the orders from which appeal is taken, vacates the discovery sanctions imposed, and provides for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

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Greenville, South Carolina
November 3, 2025

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-000364

Richard A. Gorman . . . . . Respondent,

v.

John C. Monarch . . . . . Appellant.

CERTIFICATION OF CONFORMITY

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The undersigned counsel for Appellant hereby certifies that the Final Brief to which this Certification is attached complies with Rule 211(b), SCACR.

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