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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Decisions

ARGUMENT IN REPLY

Appellant's opening brief was organized around a 7-step analytical framework derived from the decisions of our appellate courts regarding the propriety of striking a litigant's answer and counterclaim as a discovery sanction, which Respondent did not follow, and in many respects, did not address. By way of reminder, the framework is as follows:

1. Whether a discovery order has been violated;
2. Whether the party whose pleadings may be stricken has previously been expressly warned that continued non-compliance will result in the striking of his pleadings, or whether that party had disregarded prior discovery orders;
3. Whether the party whose pleadings may be stricken has continued to fail in its compliance with a discovery order, or whether that party has substantially complied with the discovery order;
4. Whether the conduct of the party whose pleadings may be stricken was wrongful or justified;
5. Whether and to what extent the opposing party has been prejudiced by the discovery misconduct attributed to the party whose pleadings may be stricken;
6. Whether and to what extent the party whose pleadings may be stricken would be prejudiced by the imposition of that sanction; and,
7. Whether striking the non-compliant party's pleadings is necessary in order to preserve the integrity of the judicial process, or whether a less-drastic sanction may be appropriate.

I. PRELIMINARY MATTERS TO ADDRESS

A. Appellant did not invite the Court to apply a different standard of review.

Respondent contends that Appellant, through his opening brief, "has attempted to expand appellate review" so that this Court may "reweigh the evidence on whether he complied with discovery." (Resp.'s Op. Br. at 18.) This criticism is misplaced.

Appellant's opening brief devotes two full pages to articulating the correct standard of review: abuse of discretion. And, rather than characterizing the law, Appellant quotes the language of this Court and the Supreme Court to explain how the abuse of discretion standard is applied in the context of an appeal challenging the striking of a party's pleadings as a discovery sanction. (Appellant's Op. Br. at 22-24.) Under that precedent, an "abuse of discretion" occurs when "no reasonable evidence" supports the sanction or when the sanction was "imposed contrary to the correct law." See, e.g., Welch v. Advance Auto Parts, Inc., 445 S.C. 640, 650 916 S.E.2d 320, 326 (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).

Under this framework, Appellant has no choice but to delve into the facts and circumstances that led the trial judge to strike his answer and counterclaim, to examine whether the court applied the proper analytical framework, and to test whether the "no reasonable evidence" standard is met as to each element of that analysis. Otherwise, this Court cannot possibly determine whether the sanction was legally correct or supported by "reasonable evidence," or whether it must be reversed because the absence of reasonable evidence to support each and every element of the sanctions analysis cannot sustain the most drastic sanction available in civil litigation.

B. Each of Appellant's arguments is preserved for review.

Respondent has asserted that some of the issues raised by Appellant are not preserved for review. (Resp.'s Op. Br. at 33-34.) Respondent is mistaken.

Courts have consistently recognized that error preservation is not intended as a procedural trap. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (preservation of error is "not a 'gotcha' game"). In situations where, as here, the record is fully developed, the reviewing court may properly examine the whole record in assessing preservation. Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). If any uncertainty exists as to whether an issue has been adequately preserved, that uncertainty should be resolved in favor of finding preservation. See Johnson v. Roberts, 422 S.C. 406, 411-12, 812 S.E.2d 207, 210-11 (Ct. App. 2018).

Here, every argument that Appellant has raised in opposition to the sanctions imposed was raised to the trial court and rejected:

1. Respondent contends that the limitations of Rule 37(f), SCRCP, were never raised to the trial court. Yet Respondent's motion for sanctions that resulted in the striking of Appellant's pleadings was presented to the trial court under Rule 37, and ostensibly, the sanctions order of February 26, 2025 was decided under the standards established by Rule 37. Appellant raised Rule 37(f) explicitly in its memorandum in opposition to the motion for sanctions that Respondent filed in 2023, which led to the order of April 28, 2023 involved in this appeal. (R. 1086.) Furthermore, the affidavits and reports of each party's forensic experts discussed the routine operations of the internet browsers on Appellant's MacBook and how those operations resulted in the

routine deletion of sufficiently aged browsing history. (See R. 1240 at ¶ 21; R. 1321 at ¶¶ 7(2) & (3); R. 1249–50; R. 1329–30 at ¶ 5.) Those affidavits and reports were filed with the trial court in connection with Respondent's sanctions motions, and according to the February 2025 order, were expressly considered by the court, (R. 100).

2. Respondent claims that Appellant never communicated his fears about Respondent's discovery abuse to the trial court. The record is replete with examples of Appellant having done so, (see R. 386–391; see also R. 407–33 & 1088–89), and in fact, the court's order of April 2023 established protections against use and disclosure of information obtained from a forensic analysis of Appellant's electronic devices for this very reason, (R. 82).

3. Respondent says that Appellant never raised the issue of delay attributable to Respondent to the trial court. But this too is found in Appellant's filings with the court in opposition to sanctions. (See R. 1086.)

4. Finally, Respondent claims that Appellant never raised the absence of prejudice to the trial court, or the proposition that Respondent cannot win on the merits of his case. That is plainly contradicted by the record. (See R. 1219, 1403 & 222:23-238:15.)

C. Respondent has abandoned any additional sustaining grounds.

Respondent's brief does not identify any additional sustaining grounds. See Rule 208(b)(2), SCACR. Accordingly, to the extent that any additional sustaining grounds may exist, they are not before the Court and have been abandoned. See, e.g., I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (citations omitted).

II. APPELLANT DID NOT VIOLATE A DISCOVERY ORDER OF THE COURT.

The most basic element of the analysis regarding a sanction that strikes a party's pleading is whether that party violated a discovery order. This is a litmus test: there are no appellate decisions that affirm a trial court's decision to strike a party's pleadings in the absence of a violation of an underlying discovery order. See Skywaves I Corp. v. BB&T, 423 S.C. 432, 459, 514 S.E.2d 643, 657-58 (Ct. App. 2018).

Accordingly, a necessary first-step in these appellate proceedings is to examine whether Appellant violated a discovery order through which his pleadings may be stricken. In this case, there are only three:

1. The consent order of August 21, 2020;
2. The order granting Respondent's motion to compel of March 28, 2022; and,
3. The sanctions order of April 28, 2023.

A. Appellant did not violate the discovery order of August 2020.

There are numerous assertions in Respondent's opening brief that Appellant violated the consent order of August 2020. The trial court made a similar finding in its sanctions order. (R. 102.) But these are not supported by the record.

The August 2020 order provides 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 the [Respondent] may select for examination by the [Respondent] or such persons as he may choose.

(R. 32 at ¶ 1(d).)

The August 2020 order explains that Appellant may comply by providing Respondent with a list of electronic devices that Appellant was using in 2013. In response, Appellant identified a 2013 MacBook Pro and an iPhone 5. (R. 52.)

The August 2020 order also directs the parties "to cooperate" with respect to the production of the devices for inspection. They tried. (See R. 637–75.) The parties' counsel exchanged voluminous emails about the production of Appellant's electronic devices. Ultimately, however, counsel could not agree on how the production of Appellant's devices could be achieved while also protecting his legitimate privacy interests. Respondent argued that Appellant had waived any and all rights to protect the information on his devices and would agree to allow information to be marked "Confidential" only after an attorney had personally reviewed the document and certified its protectable status. To Appellant, however, this protocol was prohibitively expensive and simply not practicable. Appellant instead proposed keyword searches of his devices, but Respondent rejected that proposal (even though that is exactly what the forensic expert appointed by the trial court ultimately did).

Regardless, the August 2020 order directed Appellant to identify his electronic devices; he did. The order further directed the parties to cooperate with respect to producing the devices; Appellant did.

B. Appellant did not violate the orders of March 2022 and April 2023.

Respondent's opening brief argues that Appellant violated the trial court's orders of March 2022 and April 2023. And, in the order that gave rise to this appeal, the trial court found the same. (R. 94.) But this is not correct.

In its April 2023 order, the trial court directed Appellant to "fully comply with the March 28, 2022 Order of Judge Kinlaw within 45 days;" otherwise, Appellant would be fined $7500.00 and his pleadings would be stricken. (R. 82.) Critically, there was no practical way—in terms of finances or actual reality—for Appellant to both comply with the order and protect his legitimate privacy interests from utter destruction at the hands of an opposing party who had a demonstrated track record of seeking to humiliate him publicly. (R. 266–84.)

Regardless, by the time that the April 2023 order was issued, Appellant had exhausted all reasonable avenues of relief available to him. Appellant had asked the trial court to reconsider its March 2022 decision to establish a protocol that was far more likely to provide Appellant with meaningful protection of his legitimate privacy interests, but that was denied. Appellant had sought immediate, interlocutory review with this Court—hoping that the Court would take jurisdiction in light of the immediate, irreparable harm that compliance with the March 2022 order would likely cause, in light of the fact that compliance was not possible, but that invitation was declined.

Consequently, in the wake of the April 2023 order, Appellant had no choice but to attempt compliance with the March 2022 decision and let the chips fall where they may. Which is exactly what Appellant did. Appellant turned his 2013 MacBook Pro over to the court-appointed forensic examiner—Mr. Abrams—who not only created a complete digital image of the laptop, but also found all the data from Appellant's iPhone 5 that was thought lost. In short, the April 2023 order directed Appellant to comply fully with the March 2022 order, and Appellant did.

But this raises an important point. The March 2022 order was the decision which established the protocol that Appellant could neither comply with nor afford. The forensic examiner couldn't comply with the protocol, either. (See R. 1146 at ¶ 7.) As a result, Mr. Abrams asked counsel for the parties to provide keyword search terms by which he could cull privileged information from the data produced, and through which he could produce a subset of data that consisted only of information that was potentially relevant to the litigation. (R. 1147 at ¶ 8.) This was exactly what Appellant had proposed in furtherance of the August 2020 consent order, which Respondent rejected. (See R. 637–75.)

Ultimately, Respondent received all the data that he was entitled to under the March 2022 order, and by association, all the data that he was entitled to under the April 2023 order. Thus, the trial court's finding of noncompliance is not supported by the record.

C. The grounds identified by the sanctions order of February 2025 are not supported by the record.

In its February 2025 order striking Appellant's pleadings, the trial court identifies several grounds in support of its decision:

1. That Appellant willfully destroyed potentially relevant information on the MacBook;
2. That Appellant failed to preserve potentially relevant information on the MacBook;
3. That Appellant did not identify or produce other devices which potentially relevant information that had been stored on his MacBook or iPhone may have been shared with;

4. That Appellant unreasonably delayed compliance with discovery; and,

5. That Appellant failed to preserve electronic correspondence with a material witness, and that such correspondence occurred at some point before that witness's deposition.

As discussed below, the record does not support any of these conclusions. But, for the purposes of this argument section, it is important only to note that none of the bases identified as support for striking Appellant's answer and counterclaim relate to the violation of a discovery order. Each and every obligation established by the discovery orders of August 2020 and March 2022 was observed.

D. There is no reasonable evidence that Appellant willfully destroyed data.

The sanctions order of February 2025 concludes that Appellant "has willfully destroyed or removed relevant and material evidence," and that such "actions were clearly done with the goal of destroying the evidence and making sure it was not discoverable." (R. 101.) There is no evidence for this conclusion.

Mr. Abrams' forensic examination of Appellant's MacBook found more than 4 million files on the laptop's hard drive. (R. 1147–48 at ¶ 10.) The laptop also contained a full backup of Appellant's iPhone 5, which contained over 200,000 messages. (R. 1147 at ¶ 9.) The iPhone data appeared to be entirely intact, leading Mr. Abrams to opine that "the issue of the iPhone 5 may be resolved." (Id.)

With respect to the MacBook, initially, Mr. Abrams was concerned that the laptop's files may have been manipulated. (R. 1162–63 at ¶ 4.) However, the two other forensic professionals involved in this case concluded that Mr. Abrams' concerns about

data manipulation were probably the result of the analytical software that Mr. Abrams himself had used. (See R. 1321 at ¶ 7(5); R. 1332 at ¶ 12.)

Mr. Abrams was also concerned about the removal of internet history on the MacBook. (R. 1162–63 at ¶ 4.) However, it was later explained that Mr. Abrams' concerns were the result of a failure to appreciate how internet browser history in Safari and Google Chrome is maintained. (See R. 1321 at ¶¶ 7(2) & 7(3); see also R. 1249–50.)

Respondent's forensic expert—Mr. Watkins—then complained of what he perceived to be deletion of "Bash history" files from the MacBook. (R. 1237–40 at ¶¶ 15-20.) However, the information reflected in these files—even if deleted—would remain in other related file formats, and in fact, did so. (R. 1321 at ¶ 7(4); R. 1251; see also R. 1331 at ¶ 8.)

Ultimately, and as the trial court seemed to appreciate, no one could render an opinion with any certitude as to whether information on Appellant's MacBook was intentionally deleted, accidentally deleted, or removed by internal processes of the machine. (R. 100–01.) Even if information on the MacBook had been intentionally deleted, no expert could render an opinion as to whether it was Appellant himself who had deleted the data, or when. Nor could any expert opine as to the content of the information that was allegedly lost. In other words, Appellant may or may not have intentionally deleted data from his laptop, it may or may not have happened during the pendency of a discovery order, and it may or may not have contained information that was relevant and material to Respondent's case.

Regardless, the trial court resolved each of these ambiguities in Respondent's favor: the trial court found that Appellant had personally and purposefully deleted

information from his MacBook, with the goal of destroying evidence, and the information deleted was both relevant and material to Respondent's allegations. (R. 101.) There is simply no evidence in the record to sustain any of these conclusions.

E. Appellant did not fail in preserving potentially relevant electronic evidence.

The order of February 2025 holds that extreme sanctions are appropriate because, even if Appellant did not willfully destroy material evidence from his MacBook, his negligence in failing to preserve material evidence supports the striking of his pleadings. (R. 101.) This is also not supported by any evidence in the record.

Respondent's expert initially claimed that the absence of certain "Bash history" files evidenced the removal of material information. Appellant's expert observed that the information contained in "Bash history files" would be—and is—present in other "history" files stored on Appellant's MacBook. (R. 1321 at ¶ 7(5).) Respondent's expert ultimately conceded this point. (See R. 1331 at ¶ 8.)

As to the removal of information about internet browsing history, it is the undisputed testimony—given by Appellant's expert—that the internet browsers used on Appellant's MacBook had a built-in one-year retention protocol that resulted in the rolling automatic removal of files as they aged-out. (See R. 1249–50.) Respondent's expert conceded this point but nonetheless faults Appellant for not taking steps to preserve his browsing history "indefinitely." (R. 1329–30 at ¶ 5.) As a notable aside, the browsing history from Appellant's laptop for a different internet browser continued to reflect data going back to 2013, (R. 1250), further undermining the conclusion that Appellant had taken deliberate action to wipe his internet browsing history.

There is also no evidence that any relevant information that would be material to Respondent's claim was reflected in the internet browsing history that was removed from Appellant's laptop. Moreover, according to the affidavit of Respondent's expert, the "deletion and overwriting of browsing history from the relevant 2013 timeframe" appears to have taken place sometime in 2017—three years after Respondent sent a preservation letter, and three years before the issuance of the first of the discovery orders at issue in this case. (R. 1329–30 at ¶ 5.) Therefore, at the time of the auto-deletion of browser history, years after the relevant exchange underlying this litigation, Appellant was not under a discovery order to preserve such information, and Respondent had not even tried to obtain it.

As a final observation, there does not appear to be any reported decision from the courts of our State which affirms the striking of a party's pleadings due to that party's mere failure to preserve a small portion of electronically stored information due to the routine operations of an electronic storage system, much less when the information at issue is of questionable relevance and was not subject to any court-order of preservation. See Rule 37(f), SCRCP; cf. QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004) (affirming the decision of the trial court in striking a party's pleadings where the party was ordered through a TRO to produce the hard drive of a computer for forensic inspection, which revealed that the hard drive had been wiped clean by reformatting the day before it was produced).

F. Appellant did not fail to identify and produce other electronic devices.

The February 2025 sanctions order holds that striking Appellant's pleadings is proper because he failed to identify other devices to which the MacBook was connected. But a sanction of this magnitude on this ground is not supported by the record.

Mr. Abrams opined that, "[i]n 2017 two Samsung T5 SSD hard drives were connected to [Appellant's] MacBook and may have been used to copy the older data onto this MacBook as was [Appellant's] original recollection." (R. 1146 at ¶ 11.) To be clear, Mr. Abrams could not conclude what information was imported from, or exported to, the external hard drives; and he did not offer an opinion at all to suggest that information was removed from the MacBook to the hard drives, resulting in any information being permanently deleted from the MacBook. His supplemental affidavit is completely silent on this issue. (See R. 1329.)

The affidavits of Respondent's expert mention nothing about external hard drives being connected to Appellant's MacBook. (See R. 1223 & 1329.) Instead, Mr. Watkins raised a new issue that Mr. Abrams never did: the contention that Appellant's MacBook connected remotely with external devices between October 20, 2015 and January 3, 2018. (R. 1238–39 at ¶ 19.) His opinion, however, reaches no conclusions about how long the connections lasted, what activity was undertaken during those connections, and whether any information was removed from Appellant's MacBook permanently. Importantly, his opinion completely neglects the fact that, for a full year during this period of activity, the underlying litigation had been stayed at Respondent's initiative. And, as noted above, during the entirety of this period of activity, Appellant was not subject to any discovery order, much less an order that prohibited him from using his computer.

In fact, no discovery order in this case has ever required Appellant to disclose any and all devices that were ever connected to his MacBook at any time. The initial discovery order of August 2020 simply required Appellant to disclose the devices he was using in 2013, which he did. The orders of March 2022 and April 2023 compelled Appellant to produce those devices for forensic inspection, which he did.

Moreover, there is no evidence that any of these connections were used to remove information that was relevant and material to Respondent's claim from Appellant's possession, custody, or control.

G. There is no evidence that Appellant has delayed these proceedings.

Another basis advanced in support of striking Appellant's pleadings is the assertion that it was wrongful for Appellant to exercise all lawful procedural avenues available to him to protect his legitimate privacy interests. (R. 101.)

Litigants do not forfeit the right to protect their legitimate privacy interests simply because they become embroiled in litigation. This proposition is true in every lawsuit; it is especially true in this one. Appellant has found himself locked into intractable litigation with an opponent who has no qualms about maligning Appellant on the most public of all forums. On multiple occasions, Respondent has attacked Appellant publicly through false, misleading, and incendiary commentary posted on Respondent's fake-news website. If Respondent had been given unrestricted access and publication rights to any and all information found on Appellant's laptop through discovery, such information would have swiftly made its way to Respondent's website, and Appellant's most personal, sensitive information would have been posted for all the world to see.

Consequently, when Respondent argued that Appellant had waived all rights to protect information on his electronic devices under the August 2020 order, Appellant had no choice but to seek protective measures against the weaponization of discovery. When the trial court issued the order of March 2022 establishing protections for Appellant that were neither practicable nor affordable, Appellant had no choice but to seek reconsideration of the court's decision with the hope that the court would amend its production protocol. When the trial court refused to reconsider the March 2022 protocol, Appellant had no choice but to try to invoke the jurisdiction of this Court. When that effort failed, Appellant was left with no choice but to comply with the trial court's discovery order, fully anticipating that the worst was soon to come.

The February 2025 order casts a dim light on the lengths that Appellant went to for the protection of his legitimate privacy interests, characterizing Appellant's efforts as both dilatory and malicious. And that's simply not the case. Appellant wanted only protection from the significant risk of discovery abuse at a price he could afford. Under the court's March 2022 decision, he got neither; his situation only slightly improved under the court's April 2023 decision. Ultimately, as explained above, Appellant complied with the trial court's discovery orders; yet he was still sanctioned, and his pleadings were still stricken. He has found himself in exactly the same place he would have been had he never even tried to comply.

Ultimately, had the trial court done what Appellant encouraged it to do from the beginning, and what Mr. Abrams ultimately did do—that is, limit electronic discovery to information based on keyword searches and prohibit the use of any information gained

therein for any purpose other than for litigation, the need for these appellate proceedings would almost certainly have been obviated.

H. Communications with a Witness

The final basis of the February 2025 order is the conclusion that Appellant engaged in discovery abuse by failing to preserve an electronic communication with a witness in the months preceding that witness's deposition. Appellant's opening brief has addressed this circumstance at length and incorporates that discussion herein. (See Appellant's Op. Br. at 19 & 37-38.)

For purposes of this argument section, it is necessary only to highlight the fact that Appellant was never under an order prohibiting him from corresponding with witnesses generally or from Mr. Shpetrik in particular. Moreover, the undisputed testimony is that Mr. Shpetrik initiated the electronic communication at issue and that Mr. Shpetrik—not Appellant—set the conversation to delete immediately and automatically upon termination of the conversation. Finally, and importantly, the conversation occurred more than 10 years after the facts and circumstances giving rise to the underlying litigation, and according to the undisputed testimony of both Appellant and Mr. Shpetrik, nothing of substance to the litigation was discussed.

I. Section Concluding Summary

The sanctions order has characterized Appellant as having engaged in a pattern of discovery abuse. But that conclusion is not supported by the record. Critically, and based on well-established precedent, the sanction of striking a party's pleading must be supported by the violation of a discovery order. As explained above, Appellant has not

violated any discovery orders, and the imposition of the sanction striking his pleadings constitutes an abuse of discretion that must be vacated.

III. APPELLANT COMPLIED WITH THE ONLY ORDER THAT THREATENED STRIKING HIS PLEADINGS AS A DISCOVERY SANCTION.

The only order of the trial court that expressly warned Appellant that his answer and counterclaim was subject to being stricken was the order of April 2023. (R. 78.; see also Appellant's Op. Br. at 39-41.) That order required Appellant to comply fully with the prior discovery order of March 2022 to avoid sanctions. And, as explained above, Appellant did comply. Accordingly, with respect to the single order that warned Appellant of the most extreme civil sanction available, Appellant fully complied in a timely fashion.

IV. APPELLANT'S EFFORTS TO PROTECT HIS LEGITIMATE PRIVACY INTERESTS FROM DISCOVERY ABUSE WERE JUSTIFIED.

Despite the trial court's characterization of Appellant as having acted in bad faith, the evidence in the record demonstrates that Appellant's hesitation with providing Respondent with unfettered access to his electronic devices was motivated by Appellant's reasonable fear that Respondent would abuse its contents. Furthermore, as soon as the trial court established protections against Respondent's use and disclosure of such information, Appellant produced his devices. Certainly, as Appellant observed in his initial brief, the trial court may have lost patience with this litigation; but that is an insufficient basis on which to find that a litigant has acted in bad faith, to sanction a litigant, and to strike his pleadings. (Appellant's Op. Br. at 41-42 & 49.)

V. RESPONDENT HAS NOT DEMONSTRATED ANY PREJUDICE.

In South Carolina decisions that affirm the discovery sanction of striking a party's pleadings, one of the critical elements has been whether the party seeking sanctions has been prejudiced by the discovery misconduct alleged. Here, that element is not met.

Respondent contends that its discovery rights have been "trampled" and that prejudice must be presumed Welch v. Advance Auto Parts, Inc., 445 S.C. 640, 656, 916 S.E.2d 320, 328 (2025) (quoting Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 58 (Ct. App. 2003)). However, even a cursory review of the cases where discovery rights were "trampled" demonstrates that the present matter is far from within their class. In Welch, the defendant's answer was stricken because it did not respond to any discovery, at all. Under these circumstances the Supreme Court had little trouble in affirming the trial court's sanction. In QZO, Inc. v. Moyer, the defendant's answer was stricken because he produced a laptop for inspection pursuant to a TRO whose hard drive had apparently been wiped clean literally the day before production. 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). In Griffin Grading & Clearing, Inc. v. Tire Service Equipment Manufacturing Company, the defendant's answer was stricken because it had never provided meaningful responses to discovery requests and had not allowed a corporate deposition to occur despite years of discovery. 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999).

The instant dispute bears none of these hallmarks. The parties have engaged in extensive amounts of discovery, and both have been deposed. With specific respect to Appellant's MacBook, Mr. Abrams found and processed 4 million data files. (R. 1147 at ¶ 9.) These files included a back-up copy of Appellant's iPhone 5, from which Mr.

Abrams was able to extract more than 200,000 messages. (Id.) Mr. Abrams analyzed these files for information that was relevant to Respondent's claim based on keywords that Respondent's counsel provided. And, once that exercise was complete, Respondent's own forensic examiner—Mr. Watkins—was able to receive and analyze the responsive data files recovered from Appellant's electronic devices.

Importantly, not a single document recovered from Appellant's electronic devices provided substantive evidence of Respondent's claim. No forensic examiner found any evidence that Appellant had engaged in a scheme to blackmail Respondent or had perpetrated a campaign of defamation against Respondent.

According to both Respondent and the trial court, the dearth of inculpatory evidence recovered from Appellant's electronic devices was proof that Appellant had engaged in "a pattern of deceit and destruction of material evidence which [Respondent] needs to have access to before proceeding further with his case." (R. 103–04.) It is mystifying, though, why the dearth of evidence was not considered validation of Appellant's plea of innocence all along, especially because Respondent has never come forward with a single fact or witness in more than 10 years that is able to connect Appellant to a campaign of blackmail or defamation. Appellant does not understand how he can suffer the most drastic sanction available in civil litigation for failing to produce evidence that never existed.

Respondent also claims prejudice by contending that, because of Appellant's conduct with respect to the MacBook, Respondent is unable to marshal a defense against Appellant's counterclaim because the data which should have been on the MacBook was "essential" to his case. (Resp.'s Op. Br. at 35.) This is demonstrably false. Appellant's

counterclaim is for defamation. (R. 212 at ¶ 71 et seq.) The defamation at issue began in July 2017 when Respondent—through his fake-news website—publicly accused Appellant of extortion and bank fraud, going so far as to claim that Appellant is responsible for causing another's death by suicide. (Id. at ¶ 78 & ¶ 82.) Respondent also publicly and without evidence accused Appellant of orchestrating a blackmail scheme, and then attempted to use search-engine optimization to spread his false and defamatory allegations far and wide. (See id. ¶¶ 80-86.) All of these defamatory posts made by Respondent were published more than 3 years after the facts and circumstances giving rise to the underlying complaint. And there is no evidence whatsoever that Appellant ever deleted any information on his MacBook that would substantiate these allegations.

In fact, Respondent's argument actually forms a fairly damning set of admissions. When Respondent complains that he can't defend against Appellant's counterclaim for defamation for saying that Appellant committed extortion, Respondent is admitting that he is not in possession of any facts that would substantiate the statements that he published. The same is true for his accusations of bank fraud. And for blaming Appellant for causing another's death by suicide. Respondent is brazenly admitting that he made each and every of those statements without any factual support and was hoping that something he could have learned in discovery would have bailed him out.

Nor may Respondent credibly claim that he has suffered prejudice in the form of being delayed from a speedy trial. The case chronology is detailed in Appellant's opening brief, and that timeline speaks for itself. (Appellant's Op. Br. at 44-45.) Furthermore, the only party who has ever asked the court for a trial date is Appellant, and the only reason trial did not occur when it was initially scheduled was because

Respondent attempted to designate an undisclosed expert on the eve of trial. See, e.g., Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming the decision of the trial court in finding that a party's attempt to disclose a testifying expert on the eve of trial was an abusive discovery practice that, among other circumstances, justified the striking of that party's pleadings).

VI. THE PREJUDICE THAT APPELLANT WILL SUFFER IS SEVERE.

In his opening brief, Appellant drew the Court's attention to Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), which reversed a trial court's santion striking a party's pleading because the windfall that the opposing party would have enjoyed by the imposition of that sanction constituted an abuse of discretion. (See Appellant's Op. Br. at 45-46.) The February 2025 sanctions order did not contemplate the prejudice that Appellant will suffer—the windfall that Respondent will enjoy—if Appellant's counterclaim for defamation is stricken. And not surprisingly, Respondent's brief does not address Karppi or Appellant's argument, either.

But this presents a host of critical points that cannot be ignored. First, consistent with Karppi, when a discovery sanction would result in the dismissal of the party's counterclaim, the trial court must balance the equities between the parties to determine whether the sanction is appropriate—to allow the party moving for sanctions to evade liability altogether on the counterclaim presented. The failure of the trial court to engage in such a balancing exercise constitutes an abuse of discretion.

Second, and relatedly, Appellant's counterclaim is distinct from the claim that Respondent has sued upon. Appellant's counterclaim is based on Respondent's own campaign of defamation against Appellant while the litigation has been pending in which

Respondent publicly accused Appellant of committing extortion and bank fraud, and publicly attributed another's death by suicide to Appellant. There is no reason in justice or equity that Respondent ought to be excused of his liability for defaming Appellant. Yet that is exactly what the sanctions order has permitted, and that constitutes an abuse of discretion.

The third matter of prejudice is the nullification of Appellant's meritorious defense. Appellant has consistently maintained throughout this litigation that he did not attempt to blackmail Respondent, and he never called Respondent a pedophile. In 10 years of litigation, Respondent has not discovered any evidence that Appellant attempted to engage in blackmail, and he has not discovered any witness who can affirm that they received a communication from Appellant through which Appellant accused Respondent of pedophilia. But that was not the lens through which the trial court viewed the case. Instead, the trial court appears to have assumed the truth of Respondent's claims and placed the onus of exoneration of Appellant; indeed, to quote the sanctions order, "[Appellant] had within his means the ability to provide the necessary information to clear himself if he was not the publisher of this information." (R. 101.) This leads to a catastrophic chain of illogic: because the trial court apparently assumed the truth of Respondent's allegations, and because no inculpatory evidence was found on Appellant's electronic devices, this must necessarily mean that Appellant removed such evidence. Apparently to the trial court, the simplest explanation—that Appellant did not engage in the conduct he has been accused of—was simply not possible. There is no evidentiary support for these conclusions, and for this additional reason, the trial court's sanction constitutes an abuse of discretion.

VII. EVEN IF SANCTIONS WERE APPROPRIATE, THE TRIAL COURT ABUSED ITS DISCRETION BY NOT IMPOSING A LESSER SANCTION.

As noted in Appellant's opening brief, South Carolina precedent imposes strict requirements for imposing discovery sanctions that strike a party's pleadings, and mandates that such sanctions should be reserved for only the most egregious cases. (Appellant's Op. Br. at 21-24.) Here, those exacting standards are not met.

There is no reasonable evidence in the record to support the contention that Appellant acted toward his discovery obligations in bad faith, or that he willfully disobeyed trial court orders, or that he acted with gross indifference to Respondent's legitimate discovery rights. Nor is there any evidence to suggest that he has engaged in a pattern or practice of discovery abuse. Respondent, for his part, has incurred no demonstrable prejudice. Respondent has never produced any fact or circumstance to lend independent credence to the claim he has litigated against Appellant for 10 years. It is hard to fathom how Respondent could be materially prejudiced from developing evidence to support a claim that has never had any evidentiary support whatsoever, that has been based from the outset on nothing more than Respondent's speculation.

Ultimately, in fashioning a discovery sanction, "the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of the case." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990). Appellant has a meritorious defense against Respondent's claim; he has his own meritorious claim against Respondent for Respondent's campaign of defamation. Appellant was foreclosed from both as a consequence of the trial court's sanction.

For all these reasons, even if it were appropriate to impose a discovery sanction against Appellant, if the aim of Rule 37 is to fashion a sanction that is sufficient but not

greater than necessary to protect the integrity of the justice system, the sanction striking Appellant's pleading constitutes an abuse of discretion that causes Appellant incalculable prejudice. The sanction imposed is not a rifle shot; it is not a shotgun blast; it is not even a tactical nuke merely detonated on the battlefield. It is a hydrogen bomb delivered from Earth's orbit that completely obliterates Appellant's claims, defenses, and litigation rights. The sanction must be vacated.

CONCLUDING STATEMENT

The sanction imposed here was the most extreme in civil litigation, yet the record shows no violation of a discovery order, no bad faith, and no prejudice to Respondent. Appellant complied with every order entered, produced millions of files including a full back-up of his iPhone, and even surrendered more for inspection than was required. What remains are speculative accusations and a sanction that extinguishes both a meritorious defense and a viable counterclaim. South Carolina makes clear that such a harsh sanction is reserved for only the most egregious cases, and this is not one of them. The order striking Appellant's pleadings must be vacated, and this case returned to the court below for a decision on its merits.

Appellant respectfully requests a decision from the Court of Appeals which provides for this and any other relief which may be just and proper, as may appear from any fact or circumstance reflected on the record.

Respectfully submitted,

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Greenville, South Carolina
November 3, 2025

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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