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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable David P. Caraker, Circuit Court Judge

Appellate Case No. 2025-001074

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

v.

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

of which Boggs Contracting, Inc. is the ……..…Appellant.

FINAL BRIEF OF RESPONDENTS

BARNES LAW FIRM, LLC
Kathleen C. Barnes, SC Bar No. 78854
P.O. Box 897
Hampton, SC 29924
803-943-4529
kbarnes@barneslawfirmsc.com

CULBRETH LAW FIRM
Stephen E. Culbreth, Esquire
culbrethlaw@juno.com
(admitted Pro Hac Vice)
PO Box 446
Wilmington, NC 28402

EVANS MOORE, LLC
Scott C. Evans, SC Bar No. 77684
scott@evansmoorelaw.com
James B. Moore, III, SC Bar No. 74268
James@evansmoorelaw.com
George W. Bryan, III, SC Bar No. 104088
george@evansmoorelaw.com
121 Screven Street
Georgetown, SC 29440

JERRY L SPIVEY LAW FIRM
Jerry L. Spivey, Esquire
Jspivey1@ec.rr.com
(admitted Pro Hac Vice)
206 N. 4th Steet, Ste 2
Wilmington, NC 28401

Attorneys for Respondents

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the lower court properly relied on its inherent powers to strike Boggs's Answer as a sanction for giving false testimony under oath, swearing to a false verification, and failing for two years to produce responsive discovery materials?

II. Whether the lower court's factual findings are all supported by the Record where Boggs does not dispute the facts but only the court's interpretation that is within its discretion?

III. Whether the lower court considered lesser sanctions and properly exercised its discretion to sanction Boggs by striking its Answer where the Order fully explains the court's analysis and bases for its decision?

IV. Whether Boggs preserved an issue about criminal contempt or due process when it did not raise either issue to the lower court and there is no ruling on either issue?

V. Whether the lower court sanctioned Boggs rather than holding it in criminal contempt where Respondents did not seek contempt and the Orders on appeal do not mention contempt?

VI. Whether the evidence and law support the lower court's finding that Boggs's conduct prejudiced Respondents and, thus, supports ordering a sanction?

VII. Whether the lower court struck Boggs's Answer and not its crossclaim where the court stated that it only struck the Answer?

STATEMENT OF THE CASE

This appeal arises out of an order striking Appellant Boggs Contracting, Inc.'s ("Boggs") Answer as a sanction for not producing responsive materials in discovery for two years and making multiple statements under oath that certain documents did not exist when, in fact, they did exist. The underlying case is a personal injury action that arises out of a catastrophic collision that occurred on February 3, 2022.

On August 3, 2022, Respondents Ryan Cobb, Malon Cobb, Brandy Cobb, and Cobb Trucking, LLC, filed a Complaint against David Alan Bigelow, Heritage Hauling, Inc., and Appellant Boggs. (R. pp. 53-64). Over the course of almost two years, Respondents sent Boggs numerous discovery requests, and filed three motions to compel seeking complete responses.

On May 3, 2024, Respondents filed a First Amended Complaint. (R. pp. 226-41). On May 28, 2024, Boggs filed an Answer to the Amended Complaint generally denying the allegations. (R. pp. 242-56).

On January 2, 2025, Respondents filed a Motion for Sanctions against Boggs for discovery abuses. (R. pp. 277-95). Boggs filed a memorandum in opposition on February 11, 2025. (R. pp. 429-50). On February 20, 2025, the lower court held a hearing on the motion. (R. p. 604).

On April 22, 2025, the lower court entered an Order granting Respondents' motion for sanctions and striking Boggs's Answer. (R. pp. 35-47). On April 23, 2025, Boggs filed a motion to reconsider. (R. pp. 462-509). Respondents filed a memorandum in opposition to the motion. (R. pp. 511-537). On May 20, 2025, the lower court entered a Form 4 Order denying the motion to reconsider. (R. p. 49). On June 2, 2025, Boggs filed this appeal. (R. p. 569).

FACTS[1]

Boggs is a road construction company based in North Carolina that was hired to manage a road paving project in Georgetown County, South Carolina. (R. p. 227). The SCDOT paid Boggs over $7 million dollars for the project. (R. p. 531). Under the SCDOT job requirements, Boggs agreed to maintain a traffic control plan that included a series of three warning signs placed at specific intervals before the flagger. (R. pp. 610-11, 638).

Cobb Trucking, LLC, is owned by Ryan Cobb, who is married to Brandy Cobb. (R. p. 226). On February 3, 2022, Ryan Cobb and his brother, Malon Cobb, were riding in a truck owned by Cobb Trucking, and had stopped in the paving project traffic. (R. p. 228).

[1] Boggs's statement of facts contains many arguments on the merits of the appeal. Respondents state only facts here and reserve argument for the Argument section of the Brief.

Defendant David Bigelow was driving a dump truck owned by Defendant Heritage Hauling. (R. pp. 226, 228). The truck carried a load of approximately 58,000 pounds of hot mix asphalt for delivery to the paving site for Boggs. (R. pp. 228, 431). The dashcam for the dump truck showed that several of the traffic control warning signs were face down on the ground. (R. pp. 611, 631-55, 413-28). Bigelow did not brake for the stopped traffic in front of him, and rear-ended Ryan and Malon Cobb, forcing them to hit the tractor-trailer in front of them and run off the road into a ditch. (R. pp. 228, 609). As a result, Ryan Cobb had a leg amputation and closed his business. (R. p. 609). Malon Cobb suffered a brain bleed. (R. p. 609).

By the time first responders arrived at the scene, the traffic control signs were upright. (R. p. 611). Matt Guillot, the Boggs project manager for the road construction project, testified as a Boggs Rule 30(b)(6), SCRCP, witness. He acknowledged that, at the time of the accident, Boggs was not in compliance with the traffic control plan because two of the warning signs were blown over. (R. pp. 426-28).

One day after the collision, Boggs sent DELTA v Forensic Engineering to the scene for an inspection. (R. p. 433). They took photos and video that were provided to Boggs's insurance carrier. (R. p. 433). Seven months later, in September 2022, the Boggs employee who arranged the engineering inspection left the company. (R. p. 433).

On August 3, 2022, Respondents filed a Complaint against Boggs, David Bigelow, and Heritage Hauling. (R. p. 53). The history of discovery that ensued is critical to this Court's understanding of the lower court's decision to grant sanctions. The sanctions were based in part on Boggs's failure for two years to produce (1) emails about the collision between Boggs and a third party and (2) the existence of the engineering inspection and the videos and photos from the inspection.

On December 15, 2022, Respondents served the first set of interrogatories and requests for production on Boggs. They included requests for materials related to any investigation of the collision and a request for emails regarding the accident. (R. pp. 88-89). The instructions to the interrogatories and requests for production stated "[w]here no discoverable matter exists which would be responsive to a Discovery Request, please so state," and specified that "discoverable matter" includes what is "in the possession, custody, or control of your (a) agents, (b) employees, (c) attorneys, (d) corporate departments or divisions, (e) your parent or subsidiary corporations, (f) corporate affiliates, and (g) any other persons, firms, or corporations which because of your business relationship would readily respond to your inquiry in the ordinary course of business." (R. pp. 78, 85-86). This is important because it makes clear that the discovery sought was anything within the knowledge or the control of Boggs and others.

On April 4, 2023, after giving extensions for discovery responses, Respondents filed a motion to compel discovery responses from Boggs for failure to provide any response. (R. pp. 74-76). The motion was scheduled on the May 11, 2023 motion roster. (R. pp. 676-77). On May 10, 2023, the day before the hearing, Boggs produced discovery responses. Relevant to this appeal, Boggs gave the following responses to requests for production of documents:

> 5. All materials reflecting any investigation into the cause of the automobile collision and the cause of the Plaintiffs' alleged injuries.
>
> RESPONSE:
>
> Boggs objects to this Request to the extent it seeks information protected by the attorney-client privilege and work-product doctrine and materials to be used in preparation for trial of the case.
>
> Subject to and notwithstanding the aforementioned objections, **Boggs is not in possession of any documents responsive to this Request** but resolves the right to supplement this Request as litigation and discovery of this matter are ongoing.
>
> . . .

> 15. Any and all email messages, text messages, or messages of any kind the Defendant sent to or received from anyone regarding this motor vehicle collision.
>
> RESPONSE:
>
> Defendant objects to this Request to the extent that it is irrelevant, overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to the extent it seeks work product, attorney-client privileged communications or communications prepared in anticipation of litigation. Boggs reserves the right to supplement this Response as litigation and discovery of this matter are ongoing.

(R. pp. 335, 338) (emphasis added).

On May 11, the parties entered into a Consent Order for Boggs to provide some additional responses within 15 days. (R. pp. 1-7).

On September 1, 2023, Respondents sent a third set of requests for production to Boggs. (R. p. 116). The relevant requests and Boggs's responses are as follows:

> 36. Copies of all documents reflecting all persons who to your knowledge were present at the scene of the Subject Collision at any time in the 48 hours after the collision; their role; and what actions they took at the scene.
>
> RESPONSE:
>
> This Defendant objects to this Request to the extent that it calls for material protected by work product privilege, that it calls for the production of material prepared in anticipation of litigation, that it calls for material not reasonably calculated to lead to the discovery of admissible evidence, and that it calls for material not required for disclosure per Rule 26, SCRCP.
>
> . . .
>
> 42. All communications of any kind (regardless of electronic format, medium, or application) between Boggs and any third party relating to the subject collision or the subject load.
>
> RESPONSE:
>
> Defendant objects to this Request on the grounds that it calls for material prepared in anticipation of litigation, work product or material protected by work product privilege, to the extent that it calls for material protected by attorney-client privilege and that it is not reasonably calculated to lead to the discovery of admissible evidence.

(R. pp. 131-32, 357-58). Boggs did not produce a privilege log.

On November 14, 2023, the lower court entered a Consent Order for Date Certain Trial based on the complexity of the case and the need for the parties to have advance notice of trial to adequately prepare. (R. pp. 11-14).

On December 4, 2023, Respondents filed a motion to compel discovery responses against Boggs as to the third set of requests for production. (R. pp. 110-14). The motion was set on a February 5, 2024 motions roster. (R. pp. 667-70).

On January 31, 2024, counsel had a conference call to try to resolve the discovery issues. On February 1, 2024, Boggs served Respondents with supplemental responses to the third set of requests for production. (R. pp. 192-96). However, as to the discovery requests at issue, Boggs stated that nothing responsive existed and did not produce documents.

As to request 36 asking for documents that show anyone Boggs knew was at the scene within 48 hours of the collision, Boggs stated:

> SUPPLEMENTAL RESPONSE: Based on Defendants' attorneys' conference with Plaintiffs' attorneys on January 31, 2024, Defendants understand that Plaintiffs are not seeking any material protected by the privileges outlined above [in the initial objection]. Additionally, Defendants agree to withdraw their objection that this Request is not reasonably calculated to lead to the discovery of admissible evidence.
>
> Subject to and notwithstanding the remaining objections asserted herein, **no material responsive to this Request <u>exist</u> other than Boggs' Internal Incident Report and the TR-310 Traffic Collision Report previously produced**.

(R. p. 194) (emphasis added). Boggs did not disclose the DELTA v Forensic Engineering investigation.

As to request 42 asking for communications between Boggs and a third party relating to the collision, Boggs stated:

> SUPPLEMENTAL RESPONSE: Based on Defendants' attorneys' conference with Plaintiffs' attorneys on January 31, 2024, Defendants understand that Plaintiffs are

> not seeking any material protected by the privileges outlined above [in the initial objection]. Additionally, Defendants agree to withdraw their objection that Request No. [4]2 is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and notwithstanding the remaining objections asserted herein, **no materials responsive to this Request <u>exist</u>**.

(R. pp. 195, 373) (emphasis added).

That same day, Respondents' counsel called Boggs's counsel to question the truth of the statement that no responsive documents existed because so few emails were produced for such a catastrophic collision. In response, Boggs's counsel agreed verbally and in writing to provide a verification of the responses signed by a representative of Boggs within 14 days. (R. pp. 199, 380-82). Based on that agreement, Respondents withdrew their motion to compel. On February 5, 2024, the lower court entered a Form 4 Order stating that the motion to compel was resolved. (R. p. 15).

Two weeks later, Boggs had not sent a verification. On February 15, Respondents' counsel emailed Boggs's counsel to ask for it, and received a response that they were preparing for trial and would provide it the next week. (R. pp. 202-03).

On February 12, 2024, the lower court entered a consent order deferring mediation to occur on March 26, 2024. (R. pp. 18-21).

On March 7, 2024, after still not receiving the agreed-upon verification, Respondents filed a third Motion to Compel against Boggs. (R. pp. 140-50). Respondents asked the Court to order Boggs to provide the verification. Respondents explained that they had previously "agreed to withdraw their Motion to Compel against Boggs that was scheduled for a hearing" on February 1, 2024, based on "Defense counsel's promise of providing written verifications." (R. p. 144). Respondents noticed a Rule 30(b)(6), SCRCP, deposition of Boggs for March 14, 2024 (after receiving no response to multiple requests for deposition dates). (R. p. 144). Respondents stated that the "promised verifications will play an integral role in the questioning of Boggs' 30(b)(6)

designee and Plaintiffs' case will likely be prejudiced without the ability to question Boggs' 30(b)(6) deponent regarding these verified answers to discovery." (R. pp. 144-45). Because of Boggs's repeated discovery abuses, Respondents also moved for an order striking Boggs's Answer and for attorneys' fees and costs. (R. p. 149).

The parties attended mediation on March 26, 2024, and the case did not settle. (R. p. 221).

Respondents' third motion to compel discovery from Boggs appeared on an April 18, 2024 motions roster. (R. pp. 663-64). On April 17, 2024, the day before the hearing, Boggs produced a verification signed by Kevin J. Hayes, Jr. as an officer of Boggs, along with second supplemental responses to the third requests for production. Boggs produced two emails between it and Defendant Heritage Hauling. The verification states:

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

(R. p. 397). This verified under oath Boggs's statements that it did not send anyone to the scene after the collision to investigate and that the emails produced were the only responsive ones that existed. This was not true. These are statements of Boggs based on its corporate knowledge. They are not individual statements of Mr. Hayes based on his personal knowledge.

A week later, on April 24, 2024, at 10:00 a.m., Respondents deposed Mr. Hayes as a Rule 30(b)(6), SCRCP, witness for Boggs. (R. pp. 399-403). Mr. Hayes, testifying under oath as Boggs, confirmed the verification of the discovery responses that stated only two emails existed that are responsive to Respondents' discovery requests. (R. p. 405). He testified that he "searched his emails very thoroughly" and "asked other employees involved to do the same." (R. p. 405). When asked what other employees he asked, the only person he could name was Matt Guillot, the Boggs

project manager for the road construction project. (R. pp. 404-05). To be sure that only two emails could exist, Respondents' counsel said to Mr. Hayes, "[i]n my experience, I would expect for there to be a lot more than two emails. We just want to make sure that we've got everything that's out there." (R. p. 406). Mr. Hayes, on behalf of Boggs, testified under oath, "[r]elated to that incident, that is all that I'm aware of, yes, sir." (R. p. 406).

A few hours later on April 24, 2024, at 2:50 p.m., Respondents deposed Matt Guillot as another Rule 30(b)(6), SCRCP, witness for Boggs. (R. pp. 416-20).

On May 3, 2024, Respondents filed a First Amended Complaint adding Safe Shield, LLC, as a Defendant. (R. pp. 226-27). On September 16, 2024, the parties again mediated the case, and it did not settle. (R. p. 272). On November 27, 2024, the lower court filed an order setting the case as number 3 for a date certain trial on June 16, 2025. (R. p. 27).

On December 5, 2024, the lower court entered an order granting Boggs's motion for substitution of new counsel and relieving Boggs's prior counsel. (R. pp. 30-31). On December 13, 2024, Respondents deposed Christopher Bourque, an SCDOT employee. (R. p. 558). Boggs's new counsel questioned Bourque about an email between himself and Matt Guillot that occurred the day after the accident and discusses whether the traffic control measures "were in compliance when this incident occurred." (R. pp. 556-67, 456). Respondents' counsel had to ask that the email be marked as an exhibits to the deposition. The subject line of the email is "County Line Road Accident – 2/3/22," and Matt Guillot is the one employee that Mr. Hayes said searched his emails for everything responsive to discovery. Yet, this December 13, 2024 deposition of Mr. Bourque is the first time that Respondents were aware of this email. Boggs had failed to produce it for two years.

Respondents contend that the withheld email is fundamentally important to the case because it shows that Boggs tried to get an SCDOT report stating that Boggs was in compliance with the traffic control plan when Boggs knew that it was not in compliance. The traffic control signs were down at the time of the accident but placed upright before law enforcement arrived at the scene. The email is evidence that Boggs did not maintain the work zone as required when it allowing the traffic warning signs to lay face down on the shoulder of the roadway.

On January 2, 2025, Respondents filed the motion for sanctions against Boggs that is at issue in this appeal. (R. pp. 277-95). The impetus for the motion was Respondents' discovery on December 13 during Mr. Bourque's deposition that Boggs had documents responsive to discovery that it withheld for years, all while telling Respondents that no such documents existed. Respondents argued that Boggs withheld information and testified falsely under oath during a deposition and in the verification signed by Mr. Hayes. (R. pp. 290-93). Respondents asked the lower court to strike Boggs's Answer to the Amended Complaint or, alternatively, to order a forensic evaluation of Boggs's computers, email, cell phone, and other devices for responsive discovery. (R. p. 293). They requested attorney's fees and costs. (R. p. 293). Respondents cited to Rules 11, 26, 34, and 37, but the motion was not limited to relief under those Rules. (R. p. 277). Respondents specifically asked the court to "[a]ward any other sanctions that the Court deems necessary and appropriate under the circumstances." (R. pp. 293-94).

On January 30, 2025, the parties received notice that the motion for sanctions was set for a hearing on February 20, 2025. On February 4, 2025, Boggs began supplementing its discovery responses. As the day of the hearing on the motion for sanctions approached, Boggs produced many other emails and documents that had been wrongfully withheld. Respondents also learned for the first time that Boggs had ordered an engineering investigation the day after the accident.

Despite the fact that, in December 2022, Respondents had sent a request for production for "[a]ll materials reflecting any investigation into the cause of the automobile collision and the cause of the Plaintiffs' alleged injuries." (R. p. 335). At the time, Boggs responded with boilerplate objections and then represented that "Boggs is not in possession of any documents responsive to this Request." (R. p. 335). That was a false statement. At the time it was made, Mr. Hayes, the President of Boggs, was "the primary point of contact with legal counsel regarding this lawsuit." (R. p. 459 ¶ 2). Boggs has argued that only the employee who ordered the investigation knew about the video and photos. (R. p. 460 ¶ 7). While this is not legally relevant, as explained below, it is noteworthy that Mr. Hayes has never disclaimed his or Boggs's knowledge that the investigation was ordered and occurred, yet, even that fact was not disclosed for two years.

On February 11, 2025, Boggs filed a memorandum in opposition to the motion. (R. p. 429). It argued that Rule 37, SCRCP, does not apply because Boggs did not violate a court order; the failures to produce discovery were unintentional; Respondents did not suffer prejudice; and a forensic evaluation is unnecessary because new counsel has fixed the shortcomings. (R. p. 430). Boggs also blamed its prior counsel.

Boggs filed an affidavit of Mr. Hayes. (R. pp. 459-61). Hayes stated that he was directly involved "in collecting and providing information for all discovery responses," and is "the most knowledgeable person affiliated with Boggs Contracting regarding everything that has happened during this litigation." (R. p. 459 ¶¶ 2, 3). He stated that, after Respondents filed the motion for sanctions, he learned that an employee of a management services company contracted by Boggs sent documents to Boggs's insurance carrier in September 2022 that included the email discovered during Mr. Bourque's deposition and the photos and video from the forensic engineering investigation. (R. pp. 459-60 ¶ 4). That employee left the company a few weeks later, and Mr.

Hayes claims that no one at Boggs "was even aware of" the investigation photos and video except for that employee. (R. p. 460 ¶ 6). Notably, he does not say that no one else at Boggs was aware that the investigation occurred or was requested and paid for by Boggs.

On February 20, 2025, the Honorable David P. Caraker held a hearing on the motion for sanctions. (R. pp. 604-30). Respondents explained at the hearing that they no longer sought a forensic evaluation of Boggs's emails, etc., based on the review done by Boggs's new counsel. (R. p. 627). Respondents asked the court to strike Boggs's Answer or, alternatively, to issue sanctions as to the prior motions to compel and order the insurance adjuster—who Boggs said had all of this information during the litigation—to produce her file. (R. p. 618). Respondents showed the court the dump truck's dash camera footage that confirmed the traffic control warning signs were laying face down as the dump truck approached the collision site, as well as still shots from the dash camera of the highway patrol officer who responded to the collision minutes later that showed the signs placed back in the upright position. (R. pp. 631-55, 611).

On March 18, 2025, the lower court sent counsel a detailed, thoughtful email stating it intended to grant the motion and strike Boggs's Answer. (R. p. 510). The court directed Respondents' counsel to prepare a proposed order and to "please touch on the law regarding sanctions, with particular attention to striking an answer." (R. p. 510). Because the court did not mention Rule 37, counsel prepared an order based on the court's inherent power to sanction.

On April 22, 2025, the lower court issued an Order granting the motion for sanctions and striking Boggs's Answer. (R. pp. 35-48). The lower court began its analysis by explaining the gravity of the situation. "This decision is not made lightly and is made with a full understanding of its ramifications in this case." (R. p. 40). It was "[c]entral to the Court's ruling . . . that Boggs' conduct is more than just a discovery violation—it includes the use of a false affidavit and false

testimony under oath at a deposition." (R. p. 40). The court went through a methodical and detailed analysis to explain and support its decision to strike Boggs's Answer.

First, the court found that Boggs's conduct was intentional and in bad faith, thus making it sanctionable. (R. pp. 41-42). The court emphasized the false statements Boggs made under oath at a deposition and in a verification—both of which were prompted by Respondents' counsel's disbelief that only two emails could exist and wanting to ensure the veracity of that statement. The Court rejected Boggs's arguments that the failure to disclose was unintentional and noted that the law imputes to Boggs the knowledge of its employees. (R. pp. 41-42). The court held that Boggs could not blame its prior counsel to avoid sanctions because of the law that an attorney's actions are attributable to and binding on the client. (R. p. 42). Contrary to Boggs's repeated assertions in its statement of facts, the lower court did not find the discovery failures and false testimony "solely attributable to Boggs Contracting itself," (Br. of App. pp. 9, 11) but, instead, considered that, under South Carolina law, Boggs is responsible for the conduct of its agents.

Second, the court found that all four factors used to decide what sanction to impose weighed in favor of granting a sanction. (R. pp. 42-45). It further explained that, because "Boggs' conduct amounts to bad faith, willfulness, and a disregard of the rights of Plaintiff to fair and honest discovery," a sanction to strike Boggs's Answer is warranted. (R. p. 45). Recognizing "the severity and effect of the sanction," the court believed "that anything less would" encourage noncompliance with the Rules and with the oath to testify truthfully. (R. p. 46).

Finally, the court rejected Boggs's argument that, because Boggs did not violate a court order under Rule 37, SCRCP, the court was without the power to sanction its conduct. (R. pp. 46-47). "[T]he Court grant[ed] sanctions using its inherent powers and not based on Rule 37." (R. p. 46). The court held that part of Boggs's "bad faith conduct was aimed at avoiding entry of a court

order" by giving an incomplete and false "eleventh-hour response" to discovery when faced with a hearing on a motion to compel. (R. p. 47). "Boggs cannot avoid a court order under false pretenses and then seek to avoid sanctions because there is no court order." (R. p. 47).

On April 23, 2025, Boggs filed a motion to reconsider. (R. p. 462). Respondents filed a memorandum in opposition to the motion. (R. p. 511). On May 20, 2025, the lower court entered a Form 4 Order denying the motion to reconsider. (R. p. 49). On June 2, 2025, Boggs filed this appeal.

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "The imposition of sanctions, however, will not be disturbed on appeal absent a clear abuse of discretion by the lower court. An abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (internal citation omitted). An appellate court "will not disturb the sanctions unless no reasonable evidence supports them or they were imposed contrary to the correct law." *Welch v. Advance Auto. Parts, Inc.*, 445 S.C. 640, 650, 916 S.E.2d 320, 325 (2025).

ARGUMENT

Boggs's argument is, at its most basic level, one of avoidance. Boggs blames others and tries to separate and distinguish itself from Mr. Hayes' representations that he made as an officer of Boggs on its behalf. Boggs argues that, because it produced the materials after being caught, there is no harm and it should not be sanctioned. These positions are contrary to law and refuted by the record.

It is evident that the discovery was within Boggs's knowledge and possession during the entire course of this litigation. Whether Boggs had actual knowledge and chose to hide the evidence or had only constructive knowledge and did not disclose due to its own indifference in searching for responsive material, the result is the same—Boggs was the person with the power to find and produce the information and failed to do so when under a legal obligation to do so and when under oath. Rule 37, SCRCP, is not the sole legal source of a court's power to strike a defendant's answer as a sanction. The lower court acted well within the law and its discretion in exercising its inherent powers to sanction Boggs. For the reasons stated below, the Court should affirm the lower court's decision and remand for further proceedings.

I. The lower court properly relied on its inherent powers to strike Boggs's Answer as a sanction for giving false testimony under oath, swearing to a false verification, and failing for two years to produce responsive discovery materials.

The lower court acted within the law and its discretion in striking Boggs's Answer based on its inherent powers. It is established law that a court has inherent powers to sanction a party's bad faith conduct. Rule 37 is not the sole source of the court's power to sanction.

It is important to set straight what the lower court did and did not do in this case because Boggs misstates and misinterprets the lower court's ruling. Respondents filed a motion for sanctions arguing that Boggs withheld relevant and highly significant documents, hindered its ability to take effective depositions, gave false discovery responses, gave false deposition testimony, and produced a false verification. (R. p. 277). Respondents agreed to withdraw pending motions to compel based on the belief that Boggs was being truthful. Respondents cited to Rule 37, SCRCP, and asked the lower court to strike Boggs' Answer and to enter "an Order awarding all other sanctions that the Court deems necessary and proper under the circumstances." (R. pp. 293-94). In opposition, Boggs argued that it did not violate a court order and, therefore, its conduct

was not sanctionable under Rule 37. (R. pp. 437-38). The lower court directly addressed that argument.

It held that "Boggs' conduct is more than just a discovery violation—it includes the use of a false affidavit and false testimony under oath at a deposition." (R. p. 40). The court explained Boggs' conduct "thwarts the judicial process and upends the purposes of the discovery rules." (R. p. 40). Based on those findings, the court properly relied on its inherent powers to address the conduct complained of in the motion.

A. The lower court properly exercised its discretion to rely on established inherent powers to sanction bad faith conduct.

The law fully supports the lower court's use of its inherent powers—instead of Rule 37, SCRCP—to sanction Boggs's bad faith conduct. In South Carolina, "[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

Boggs argues the lower court "circumvent[ed]" the Rules of Civil Procedure by relying on its inherent powers and not on Rule 37. (Br. of App. pp. 23-24). Boggs attempts to make the lower court and Respondents appear under-handed in citing to the court's inherent powers. This is meritless given the dearth of federal law[2] directly on point with a court exercising its inherent powers to sanction even when Rule 37 is available as a remedy. Boggs argues as if the court's inherent powers are somehow weak or lesser than authority provided by a Rule of Civil Procedure. There is no law to support that supposition.

[2] *See Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 122 n.10, 512 S.E.2d 510, 524 n.10 (Ct. App. 1998) (citing to and relying upon federal case law on Fed. R. Civ. P. 37 because "[t]he language of Rule 37, SCRCP, is the same language as the Federal Rule with minor alterations").

It is well-established that "[t]he court has the inherent power to impose sanctions on litigants when merited by their conduct. The inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct and there is no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanction for . . . bad-faith conduct." *Scibek v. Gilbert*, No. 2:20-cv-2638-DCN, 2021 U.S. Dist. LEXIS 189779, at *5 (D.S.C. Oct. 1, 2021) (internal quotation marks omitted). The policy for "this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth." *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001). "The case law is well established that district courts have the inherent power to sanction parties for certain bad faith conduct, even where there is no particular procedural rule that affirmatively invests the court with the power to sanction." *Strag v. Bd. of Trs.*, 55 F.3d 943, 955 (4th Cir. 1995).[3] "[R]ule [37] is not applicable when the court sanctions a party pursuant to its inherent powers." *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008). "[A] district court exercising its inherent authority to impose sanctions may do so *sua sponte* and must consider the whole of the case in choosing the appropriate sanction." *Projects Mgmt. v. Dyncorp Int'l LLC*, 734 F.3d 366, 375 (4th Cir. 2013).

Boggs cites to *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995), for the proposition that a court should not circumvent the rules by invoking its inherent powers. (Br. of App. pp. 23-24). *Valentine* has nothing to do with either inherent powers or sanctions. It does not overcome the law cited above that establishes the court's inherent powers to sanction and its ability to exercise them to the exclusion of Rule 37.

[3] *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991) ("The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.").

There is no support for Boggs's position that the only available remedy is Rule 37 or nothing. That is true even if the conduct is limited to discovery but, it is especially applicable in this case where the bad faith conduct included false statements under oath. Rule 37 is not a limitation on a court's inherent powers.

B. The lower court properly exercised its discretion to strike Boggs's Answer as a sanction even in the absence of the violation of a court order.

The violation of a court order is not a prerequisite to a court issuing a sanction that strikes a defendant's answer. As explained above, the court may rely on Rule 37 **or** its inherent powers to sanction bad faith conduct. The court did not "avoid Rule 37," as Boggs alleges. (Br. of App. p. 24). It directly addressed that it did not rely on Rule 37. (R. p. 46). The court addressed Boggs's argument that it did not violate a court order by explaining that the reason a court order was not entered is because Boggs kept giving Respondents false discovery responses and a false verification that induced them to withdraw pending motions to compel.

> . . . [P]art of [Boggs's] bad faith conduct was aimed at avoiding entry of a court order. Plaintiffs filed three motions to compel against Boggs. Each time Boggs avoided a court order with an eleventh-hour response. Importantly, all of these responses were incomplete, dishonest, and nonresponsive as to the discovery at issue. Because of these responses, Plaintiffs believed there was no basis for entry of a court order. If Boggs had been honest in its responses, Plaintiffs could have obtained a court order. Instead, Boggs wants to restrict Plaintiffs' remedies because of its conduct intended to avoid a court order. Boggs cannot avoid a court order under false pretenses and then seek to avoid sanctions because there is no court order.

(R. p. 47). In response to this, Boggs merely argues that the lower court should not use "efforts to resolve discovery disputes against it" as a basis for sanctions. (Br. of App. p. 26). The court did not use resolution efforts against Boggs. It found that those "efforts to resolve discovery disputes" were successful only because Boggs made false representations.

Boggs states that an answer cannot be stricken without the violation of a court order, citing to *Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018). (Br. of App. pp. 24-25). *Skywaves* did not say that.

In *Skywaves*, the plaintiff moved to strike the defendant's answer "as a sanction for their deceitful conduct" and, "[a]dditionally," "through the doctrines of unclean hands or judicial estoppel." *Id.* at 456, 814 S.E.2d at 656. The Court of Appeals affirmed the denial of the motion to strike because it did not find that the defendant engaged in any deceitful conduct, *i.e.*, there was no sanctionable conduct. *Id.* at 458, 814 S.E.2d at 657. It then addressed the plaintiff's argument that "South Carolina courts have been more open to striking the answer of a defendant in recent years," and found that those cases involved violation of a court order while this case did not. *Id.* at 458-59, 814 S.E.2d at 657-58. The court found a straightforward way to distinguish the non-sanctionable conduct before it from those cases. That is a far cry from a holding that violation of a court order is a prerequisite to a sanction striking a defendant's answer. Further, as it relates to Boggs's argument, *Skywaves* did not involve an argument under Rule 37. If Rule 37 was the only means for the sanction of striking an answer, then the Court would surely have said so. Instead, it addressed the merits of the motion.

C. South Carolina and Federal law support the lower court's discretionary decision to use its inherent powers to sanction Boggs.

Boggs argues the law does not support a court ordering a sanction using its inherent powers. (Br. of App. pp. 26-28). It is incorrect.

In South Carolina, consistent with United States Supreme Court precedent,[4] "[c]ourts have the inherent power to do **all** things reasonably necessary to insure that just results are reached to

[4] Courts have the "inherent power to punish conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991).

the **fullest** extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (emphasis added). Boggs criticizes the lower court's citation to *Ex Parte Dibble* "because that case only addressed a court's inherent power to appoint lawyers to represent clients on a *pro bono* basis." (Br. of App. p. 27). Boggs misses the point. *Ex Parte Dibble* did not hold that the court had the inherent power only to appoint lawyers to represent clients on a *pro bono* basis. Rather, it held that the "inherent power must necessarily **include** the power to" make such appointments. 279 S.C. at 595, 310 S.E.2d at 442 (emphasis added). The inherent powers, then, are necessarily greater than the issue in *Ex Parte Dibble*. The United States Supreme Court explained:

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.

Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991). Applied to this case, Rule 37 does not displace or limit the court's inherent powers to impose sanctions for bad-faith conduct.

Boggs attacks the lower court's citation to *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006), arguing that it does support the court's exercise of its inherent power to sanction. *Brandt* is factually similar to this case in that both involve false statements made by a party and, in both situations, the courts struck a pleading. While *Brandt* mentions Rule 41, SCRCP, nowhere does the decision state that a party moved under that rule for relief. Instead, the triggering event was the introduction of a fraudulent document, and the resulting exercise of the court's power was to dismiss the complaint. *Id.* at 627, 630 S.E.2d at 263-64. The Court's citation to *Brandt* as support for exercising inherent power to sanction is valid.

Finally, Boggs attacks the court's citation to *Gathers v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). (Br. of App. p. 27). Boggs argues that *Gathers* addressed evidence spoliation and not failure to produce documents. This case does not involve only a discovery violation. It also involves two instances of false statements under oath. The lower court cited *Gathers* in response to Boggs's argument that, because Rule 37 did not apply in the absence of a court order that it violated, it could not be sanctioned. (R. p. 46). *Gathers* stated a situation in which a court could issue a sanction for discovery-related misconduct—specifically losing or destroying evidence—that did not have to rely on Rule 37. The court's point is that Rule 37 is not the exclusive source of power to sanction conduct in any way related to discovery. *Gathers* supports that point.

Boggs refers numerous times to the lower court's decision as "*sua sponte*." *See, e.g.* Br. of App. pp. 26, 28. It was not *sua sponte* because Respondents filed a motion that expressly asked the court to strike Boggs's answer and for any sanction the court found appropriate or necessary. *Cf.* Black's Law Dictionary (8th ed. 2004) p. 1464 (defining *sua sponte* as "[w]ithout prompting or suggestion; on its own motion").

Finally, there is no law to support Boggs's argument that a court may "**only** strike a defendant's answer after the court gives ample warning and opportunities to correct the discovery issues alleged."[5] (Br. of App. p. 27) (emphasis added). Its argument is incorrect for at least two reasons. First, nowhere in Rule 37, SCRCP,—which Boggs claims is the only legal authority for striking an answer—does it require warning before the court strikes an answer as a sanction.

[5] Boggs was on notice that Respondents believed its discovery conduct warranted a sanction to strike its answer. In the March 7, 2024, motion to compel discovery responses, Respondents asked the court to "enter an Order striking Defendant Boggs' Answer to Plaintiffs' Complaint." (R. p. 149). Boggs avoided a court order from that motion by producing the false discovery verification.

Second, if Boggs was correct, then there would be no discretion for the court to exercise in choosing a sanction. As an example, in *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004), this Court affirmed an order striking the defendant's answer as a sanction for violating a TRO. There is no mention that the party was warned or given an opportunity to correct the violation before the lower court struck its answer.

Boggs's conduct in withholding documents, video, and photos; failing to disclose the investigation it ordered; giving false discovery answers; giving false deposition testimony; and giving a false verification is sanctionable conduct. The lower court acted within its established inherent powers to strike Boggs's Answer as a sanction. That Boggs did not violate a court order is not a limitation on the court's inherent powers. It is merely a consideration. The court properly took it into consideration and exercised its discretion to decide to strike Boggs's Answer. This decision is fully supported by the law and evidence, and this Court should affirm.

D. The lower court correctly declined to consider the merits of the claims in deciding the motion for sanctions.

The merits of the underlying claims are not part of a court's consideration in deciding whether to grant a motion for sanctions and, if so, what sanction to order. Yet, Boggs criticizes the lower court for striking its answer and declining to consider the merits. (Br. of App. pp. 28-30). Its mistake stems from Boggs's conflation of a motion for sanctions with a Rule 55(c), SCRCP, motion to set aside an entry of default. Two different standards apply. The lower court in this case applied the correct standard.

The lower court mentioned the merits one time: "This decision is in no way a comment on the merits of this case, nor upon the actions of any of the lawyers that were, or are, involved in this case." (R. p. 47). There is no legal error in that statement.

A motion for a sanction striking a party's answer does not implicate Rule 55(c)'s consideration of "whether the defendant has a meritorious defense." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). The lower court did not hold Boggs in default under Rule 55(c), and the law related to whether to set aside an entry of default does not apply to this case.

The lower court granted a motion for sanctions and struck Boggs's answer. When deciding a sanctions motion "for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). When considering a sanction that amounts to default, courts generally assess whether there is "some element of bad faith, willfulness, or callous disregard of the rights of other litigants." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990) (internal quotation marks omitted). These standards for a sanctions decision do not include a consideration of the merits of the claims or defenses.

The lower court's decision followed the applicable law. That it forecloses a decision on the merits for Boggs is not *per se* reversible error. This is not a situation where the court disposed of the case on a technicality rather than the merits. (Br. of App. p. 29). Instead, the court fully considered the history of Boggs's litigation conduct and issued a well-reasoned, legally supported decision. A policy in favor of a decision on the merits is not a trump card to wipe away discovery abuse and false testimony.

Finally, Boggs names two meritorious defenses, but it did not plead either of them in its Answer and Amended Crossclaim. *Compare* Br. of App. pp. 29-30 *with* R. pp. 257-71. Therefore, it should be prohibited from arguing them on appeal. *See Jenkins v. Refuge Temple Church of God*

in Christ, Inc., 424 S.C. 320, 329, 818 S.E.2d 13, 17 (Ct. App. 2018) (holding a defendant was "precluded from raising this defense for the first time on appeal").

The lower court followed the law and properly exercised its discretion in ordering a sanction against Boggs. This Court should affirm.

II. The lower court's factual findings are supported by the Record.

There is evidence in the record to support all of the lower court's factual findings and its finding of bad faith and intentional conduct in this case. Boggs's burden on appeal is to show that "**no** reasonable evidence supports them." *Welch v. Advance Auto. Parts, Inc.*, 445 S.C. 640, 650, 916 S.E.2d 320, 325 (2025) (emphasis added). Because it fails to satisfy that burden, the Court should affirm the factual findings and the finding of Boggs's bad faith and intentional conduct.

A. The evidence supports a finding that Boggs intentionally concealed documents.

Boggs argues that the lower court misinterpreted the evidence when it found the Boggs concealed documents and engaged in bad faith conduct. The record shows otherwise. The discovery history in this case shows that Boggs did not take it seriously for two years. It did not fulfill its discovery obligations to search for responsive materials. Its explanation for this conduct is based on the individual knowledge of one person and ignores the discovery rules, particularly Rule 30(b)(6), SCRCP, that focus on the corporation's knowledge and not on the individual knowledge of an employee. Boggs cannot hide behind Mr. Hayes's individual knowledge when the corporation itself had knowledge or possession, or both, of all of the responsive material at the time of the original discovery requests. As the lower court highlighted, Mr. Guillot wrote the email that Respondents first learned was withheld, and he "certainly had knowledge of his own email," which is imputed to Boggs. (R. p. 42). "Our civil procedure is guided by rules whose prime directive is to 'secure the just, speedy, and inexpensive determination of every action.'" *Welch v.*

Advance Auto. Parts, Inc., 445 S.C. 640, 656, 916 S.E.2d 320, 329 (2025) (quoting Rule 1, SCRCP). Boggs's conduct undermined this purpose.

Beginning in December 2022, Respondents asked Boggs for information on any investigation of and emails concerning the collision. Respondents made clear their requests included information in possession of anyone working for or affiliated with Boggs. (R. pp. 92-105). In response to these standard discovery requests, Boggs initially produced nothing, and then objected and stated it did not possess any responsive documents. (R. pp. 335, 338).

In September 2023, Respondents asked for any persons who went to the collision scene and for any emails with third parties regarding the collision. Boggs objected to both requests on the basis of privilege but produced no privilege log. This time, Boggs did not say that it did not possess documents. It stated that responsive materials did not "exist"—which necessarily implies a full and complete search that produced no results.

Three times Respondents had pending motions to compel set for a hearing date. Three times Respondents withdrew the motions based on Boggs's assurances of its discovery responses. Three times those assurances were false. Respondents mediated the case and deposed two Rule 30(b)(6), SCRCP, witnesses with false discovery responses in hand and, as a result, accepted untruthful answers from those witnesses.

Respondents even gave Boggs a chance to make sure its representations that documents did not exist were actually true. Respondents' counsel asked for a verification of the responses because of their disbelief that only two emails could exist regarding a collision of this magnitude. They explained that this verification "will play an integral role" in Boggs's Rule 30(b)(6) depositions. (R. pp. 144-45). Respondents told Mr. Hayes, testifying as Boggs's Rule 30(b)(6) witness, that they expected more than two emails to exist. (R. p. 406). Mr. Hayes, testifying as

Boggs, stated that is all he was aware of. (R. p. 406). Boggs's search consisted of Mr. Hayes searching his emails and asking "other employees" to search their emails, but could only remember the name of one other employee who searched—Matt Guillot, who is the employee that wrote the subject email. (R. p. 405). As to the engineering investigation, Boggs does not deny knowing it ordered the investigation.

All of this is, at the very least, some evidence to support the lower court's findings that Boggs intentionally and in bad faith did not disclose responsive discovery.

Boggs argues that Mr. Hayes's testimony and verification were true at the time based on his knowledge. (Br. of App. pp. 32-33). This argument perpetuates Boggs's unsupportable position that the issue before the Court has anything to do with Mr. Hayes's knowledge. It is about Boggs's knowledge. Mr. Hayes testified **as Boggs** and signed the verification **as Boggs**. As the Supreme Court recently explained about a Rule 30(b)(6) designee:

> . . . Rule 30(b)(6) gives an organization the privilege of selecting the person who will speak for it on the designated matters, but also imposes a duty to prepare the speaker. . . . This duty does not end, as [defendant] seems to think, with the end of the designees' personal, first-hand knowledge of the noticed matters. Instead, the organization must endeavor in good faith to prepare its designee to testify on matters not only known to him, but on those topics within the notice that are, as the rule puts it, "reasonably available" to the organization.

Welch v. Advance Auto. Parts, Inc., 445 S.C. 640, 651, 916 S.E.2d 320, 326 (2025) (quoting Rule 30(b)(6), SCRCP) (internal citations omitted). Boggs cannot feign ignorance based on what Mr. Hayes, as an individual, did or did not know.

As to whether Mr. Hayes is the person who found the engineering investigation materials (Br. of App. p. 33), Boggs again misses the point. Boggs has knowledge that it ordered the investigation. That the employee who ordered the investigation is no longer employed does not erase Boggs's corporate knowledge. *See Welch*, 445 S.C. at 652, 916 S.E.2d at 326 (rejecting a

corporate defendant's argument that no one at the company had knowledge of past events).[6] "It is settled law in South Carolina that when a person has notice of facts as are sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts." *Multimedia Publ'g v. Mullins*, 314 S.C. 551, 554, 431 S.E.2d 569, 572 (1993). Boggs is charged with knowledge of its own affairs. That its counsel contends it was difficult to get the responsive materials does not mean that Boggs did not have knowledge or notice that they existed.

As to Boggs's argument that it took measures to supplement production, this is neither relevant nor dispositive of its intent at the time of its original representations. (Br. of App. pp. 33-35). All of this could have been done in December 2022 or September 2023 when the discovery requests were sent. All of the information Boggs searched and supplemented was within its possession or control during the entirety of this case.

It is self-serving to say that the discovery violations do not matter because they were "remedied" before trial or allegedly did not have a "significant impact" on Respondents' case. (Br. of App. pp. 34-36). Respondents disagree that it does not matter. They engaged in mediation and years of discovery without this information. They withdrew three motions to compel based on false representations. The email that revealed the discovery failures directly relates to a disputed issue—whether the traffic control signs were in place at the time of the accident. (R. pp. 406, 457). The parties disagree as to the meaning of the email—whether it shows Boggs trying to get a back-

[6] *See also Palmer v. Sovereign Camp, Woodmen of the World*, 197 S.C. 379, 389, 15 S.E.2d 655, 660 (1941) (stating knowledge of agent on matters within agent's scope of duty is imputable to the principal, and the principal is bound by the knowledge of such agent); 18B Am. Jur. 2d *Corporations* § 1442 (2004) ("A corporation's knowledge is entirely imputed to it from the knowledge possessed by its officers and agents. In accordance with general agency principles, a corporation generally is charged with knowledge of facts that its agents learn within the scope of their employment.").

dated compliance report—and that disagreement goes to the heart of a disputed issue in the case. Respondents contend that the email is Boggs's attempt to wrongfully get evidence that the construction site was in compliance with the SCDOT safety requirements when the dash camera footage undeniably shows that it was not in compliance at the time of the collision.

Respondents also disagree with Boggs's assertion that, if discovery issues are "cured," then courts "overwhelmingly either decline to issue sanctions at all or temper their sanctions to allow cases to proceed on the merits." (Br. of App. p. 34). Respondents are unaware of law to support that argument. If that were the case, every party would withhold discovery and then produce it only when and if the other side uncovered their conduct and avoid a penalty altogether. Boggs's position is contrary to the law that "whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules" and should not be so minimal as to "encourage, rather than discourage, noncompliance with the Rules." *Downey v. Dixon*, 294 S.C. 42, 45, 46 n.2, 362 S.E.2d 317, 318 n.2 (Ct. App. 1987). To accept Boggs's "no harm no foul" argument would encourage, rather than discourage, noncompliance with the Rules and the oath to testify truthfully.

B. The evidence supports a finding that Boggs is responsible for the discovery failures.

Boggs has repeatedly argued that its prior counsel and insurance carrier are to blame for the discovery failures. (Br. of App. pp. 35-38). This deflection is not supported by the law or the evidence in this case.

As to the discovery delays, Boggs blames them on prior counsel and disclaims knowledge of them. It argues that it cannot be bound to counsel's conduct unless it "directed the acts alleged." (Br. of App. p. 37). That is not the law. "In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority." *Koutsogiannis v. BB&T*, 365 S.C. 145,

149, 616 S.E.2d 425, 428 (2005). "Any communication failure or mistake on the part of an attorney is directly attributable to his client. Relief from such an error rests in an action against the lawyer . . . ." *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) (internal citations omitted).

There is no law stating that a client is only bound by the attorney's actions of which the client is aware. (Br. of App. p. 37). Regardless, Mr. Hayes signed a verification of discovery responses, which means that he read them. *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 263, 626 S.E.2d 6, 12 (2005) ("[A] competent person usually is presumed to have knowledge and understanding of a document he signs."). Mr. Hayes testified at the Rule 30(b)(6) deposition—which occurred before the discovery failures were discovered—that, in preparation for his deposition, he read "all of the documents—request documents. And then whatever came up with discovery that was submitted." (R. p. 552). Having read the discovery responses, Boggs cannot argue it did not know about them.

Finally, Boggs blames its insurance carrier for not sending the investigation documents to its prior counsel and disclaims responsibility for the actions of its insurance carrier. (Br. of App. pp. 37-38). Again, this argument is not relevant to Boggs's own knowledge or conduct. Importantly, Boggs does not deny knowing it ordered the investigation. It does not deny that it had the ability to get the materials from the insurance carrier. In other words, the insurance carrier was not the only entity with knowledge of the investigation or control over its contents. The lower court correctly held that Boggs cannot blame an agent over which it has control. (Order p. 8); *Palmer v. Sovereign Camp, Woodmen of the World*, 197 S.C. 379, 389, 15 S.E.2d 655, 660 (1941) (stating knowledge of agent on matters within agent's scope of duty is imputable to the principal, and the principal is bound by the knowledge of such agent).

The evidence in the record fully supports the lower court's findings, and this Court should affirm them as a proper exercise of discretion.

III. The lower court did consider lesser sanctions and properly exercised its discretion under applicable law to strike Boggs's Answer.

Boggs argues the lower court did not consider a lesser sanction. (Br. of App. pp. 38-41). That is not true. The lower court considered a range of sanctions from no sanction at all to striking Boggs's Answer. (R. pp. 45-47). It explained that imposing no sanction "would be overly lenient. (R. p. 45). It considered "numerous sanctions" and was "fully aware of the severity and effect of the sanction" of striking Boggs's Answer. (R. pp. 45-46). It considered but disagreed with Boggs's argument "that striking its answer it a 'nuclear-level' sanction." (R. p. 46). The court explained "[a]ny lesser sanction would encourage, rather than discourage, noncompliance with the Rules and would make a verification a meaningless discovery tool." (R. p. 46). Boggs cannot argue that the lower court did not consider lesser sanctions. Rather, its real complaint is with the court's choice of sanction.

"In selecting the appropriate sanctions, the trial court must consider [1] the nature of the discovery refused, [2] the discovery stage of the case, [3] willfulness, and [4] prejudice." *Welch v. Advance Auto. Parts, Inc.*, 445 S.C. 640, 655, 916 S.E.2d 320, 328 (2025). A sanction of striking a party's pleading "is harsh medicine, reserved for episodes of discovery misconduct displaying bad faith, willful disobedience, or a callous indifference to the rights of other parties and the discovery process." *Id.* at 655, 916 S.E.2d at 328 (internal quotation marks omitted). "Any sanction imposed must be sufficient to vindicate the important rights the discovery rules guarantee and the essential tools they provide to allow lawyers to prepare their clients' cases for trial." *Id.* at 655-56, 916 S.E.2d at 328.

Here, the lower court found that all four factors weighed in favor of striking Boggs's Answer. (R. pp. 43-45). It considered that striking an answer is "harsh medicine," and explained that, while "fully aware of the severity and effect of the sanction," the court believed anything less would be insufficient to discourage noncompliance with the Rules and the obligation to testify truthfully under oath. (R. p. 46). The court noted that, even when Respondents questioned the absence of documents, which should have prompted a more thorough search, Boggs "doubled down on its denial of the documents' existence." (R. p. 46). Respondents then relied upon those denials. The lower court properly considered the applicable law, and its discretionary decision is supported by the evidence in this case.

Boggs cites to *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), as support for its argument that the sanction was too harsh. (Br. of App. pp. 39-40). *Karppi* is easily distinguishable and actually supports the lower court's analysis and exercise of discretion in this case.

In *Karppi*, the plaintiff brought suit against a manufacturing-defendant and a seller-defendant for allegedly defective flooring material. The manufacturing-defendant filed a cross-claim against the seller-defendant. *Id.* at 540, 489 S.E.2d at 680. The manufacturing-defendant violated a court order to make its officer appear at a deposition. As a sanction, the lower court struck the manufacturing-defendant's answer, as well as its cross-claim against the seller-defendant and its counterclaim against the plaintiff. *Id.* at 542, 489 S.E.2d at 681.

This Court "reluctantly" reversed the sanction because it went beyond what was necessary by also striking the cross-claim against the seller-defendant. *Id.* at 543, 489 S.E.2d at 682. This resulted, on one hand, in a "windfall" for the seller-defendant when its rights were not violated, and, on the other hand, in "prejudice" to the seller-defendant because the presumption of liability

of the manufacturing-defendant "stripped" the seller "of its ability to defend on the ground that the materials sold were not, in fact, defective. *Id.* at 544, 489 S.E.2d at 682-83.

The circumstances of this case are different. First, the lower court did not strike a cross-claim or counterclaim. It struck only Boggs's Answer, which is tailored to the specific misconduct at issue. Second, the lower court specifically considered the effect of the sanction "on Boggs' co-defendants and f[ound] that, under the allegations in the Complaint, striking Boggs' answer will have no prejudicial effect on the remaining defendants' ability to defend themselves." (R. p. 46). Therefore, unlike in *Karppi*, the lower court here did consider that this case involves multiple parties and narrowly tailored the sanction to neither create a windfall for nor prejudice the remaining co-defendants.

Boggs also cites the *Karppi* Court's statement that the sanctioned-defendant's attorney "was at least as much to blame as the party itself," making the sanction "unjust" under the circumstances. 327 S.C. at 545 n.6, 489 S.E.2d at 683 n.6; Br. of App. p. 40. That is not what happened in this case. Boggs misstates the record as to its knowledge. It relies on Mr. Hayes's affidavit statement that Boggs did not know the engineering investigation materials were not sent by the insurance carrier to prior defense counsel or produced in discovery. (Br. of App. p. 40; R. p. 460). This is disingenuous. Mr. Hayes signed the verification stating the discovery responses were all true. The discovery responses Boggs verified state that there is no information about anyone going to the scene of the collision within 48 hours after the accident except for an internal incident report and the TR-310 traffic collision report. (R. pp. 193-94). That statement is not true because Boggs ordered an engineering investigation that occurred the day after the collision. When Mr. Hayes read those responses so that he could sign the verification of their truthfulness **under oath**, he should have known, acting as Boggs, that the engineering investigation had not

been produced. Boggs cannot blame prior counsel to avoid a sanction when it plainly knew what it signed and what it testified to at the Rule 30(b)(6) deposition based on its corporate knowledge.

Contrary to Boggs's assertion, the lower court did consider "the action (and inactions) of Boggs Contracting's prior counsel," (Br. of App. p. 40), and found that they did not negate Boggs's own conduct and knowledge. (R. pp. 41-42). At the very least, Mr. Hayes, acting as Boggs, reviewed the discovery responses that Boggs verified and reviewed all discovery before the Rule 30(b)(6) deposition. Both of those reviews should have put Boggs on notice that not all responsive discovery was produced. Boggs cannot negate its own knowledge by blaming prior counsel.

Boggs argues that it corrected "the discovery shortcomings" but continues to fail to acknowledge that this is not only about the failure to produce responsive materials. It is also about Boggs twice giving false statements under oath—in the verification and in the Rule 30(b)(6) deposition. That is a serious matter that warrants a serious sanction. Boggs's full production of discovery occurred only because Respondents discovered that Boggs was withholding information. Boggs's disclosure after being caught does not neutralize the damage caused or the strategic advantage that it enjoyed before every motion hearing and at depositions and mediations. If the court simply allows Boggs to cry "no harm no foul" and avoid a meaningful sanction, then it will encourage Boggs and other litigants to flout the discovery rules in the absence of any consequences for its conduct.

The sanction of striking Boggs's answer was not a "hydrogen bomb." (Br. of App. pp. 40-41). It was a "'rifle-shot' aimed at the specific misconduct of the party" that took place over months of attempted discovery and included false discovery responses about the existence of documents, false deposition testimony, and a false verification. (R. p. 46) (quoting *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 441 (Ct. App. 1990)).

This Court should affirm the lower court's exercise of discretion in choosing an appropriate sanction.

IV. Boggs did not preserve a criminal contempt or due process issue.

Boggs did not argue to the lower court that the sanction of striking its answer is "equivalent to a finding of criminal contempt" or that it did not receive due process. (Br. of App. p. 41). "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "A due process claim raised for the first time on appeal is not preserved." *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003). Boggs cannot raise these issues for the first time on appeal. The Court should find that Boggs failed to preserve an issue about criminal contempt or due process and decline to address them.

V. Alternatively, the lower court did not hold Boggs in criminal contempt.

The lower court did not hold Boggs in criminal contempt. The Court should decline to consider this issue because Boggs's arguments are nonresponsive to the Orders on appeal—neither of which mention contempt.

As an initial matter, Boggs argued to the lower court that this case did **not** involve criminal contempt. An "Appellant may not argue a different position on appeal." *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013). In its motion to reconsider, Boggs argued: "The singular, passing reference in *Brandt* to the court's 'inherent power' was in an **entirely different context** involving imprisonment for criminal contempt. It had nothing to do with striking a complaint as a discovery sanction." (R. pp. 489-90) (emphasis added). Here, Boggs argues that the lower court's citation to *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006)—a case involving criminal contempt—means that the court actually found it in

criminal contempt. (Br. of App. p. 41). Having argued that the criminal contempt in *Brandt* was an "entirely different context" than this case, Boggs cannot now argue that the lower court held it in criminal contempt. The Court may decline to address this entire argument based on Boggs's change of position.

Although the criminal contempt argument is unpreserved and unfounded, Respondents make a few responses below to Boggs's particular arguments.

First, as explained above in section I.A., there is ample law to support a court using its inherent powers to sanction, including a sanction to strike a party's pleading. The mere fact that the court struck an answer does not mean that it held Boggs in criminal contempt. Boggs cannot contort the lower court's ruling to pull an appellate issue out of thin air.

Second, although Boggs's due process arguments do not apply to these circumstances, Boggs was actually afforded due process. "Procedural due process requires notice and the opportunity to be heard." *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 194, 743 S.E.2d 843, 847 (Ct. App. 2013). Boggs was on notice that Respondents' motion for sanctions asked the court to strike its answer and "[a]ward any other sanctions that the Court deems necessary and appropriate under the circumstances." (R. pp. 293-94). When the lower court entered the Order exercising its inherent powers, Boggs was on notice of its ruling. In response, Boggs exercised its rights to file a motion to reconsider and had an opportunity to be heard on its argument that the ruling was wrong and an improper use of power. (R. p. 462). Boggs never mentioned due process in that motion. The lower court considered Boggs's arguments and denied them in its Order denying the motion to reconsider. (R. p. 49). Boggs received due process.

Third, as to *Brandt*, Boggs continues to misconstrue the lower court's citation to that case. After citing to *Ex Parte Dibble*, as to the general inherent powers of a court, the lower court also

cited to *Brandt*. The "inherent power" quote in *Brandt* is found in the criminal contempt analysis section. However, that does not mean the lower court did or intended to hold Boggs in criminal contempt. Instead, the remainder of the Order discussed the considerations for issuing a discovery sanction. The lower court plainly did not hold Boggs in contempt, and its prolonged discussion of *Brandt* is simply not applicable to the Orders before this Court.

VI. The evidence and law support the lower court's finding that Respondents were prejudiced by Boggs's conduct.

The lower court found Respondents "suffered prejudice because of Boggs' conduct." (R. p. 43). The court cited law that prejudice can be presumed when a party's discovery rights are violated, but plainly held that, in this case, "prejudice is not only presumed but is, **in fact, proven**." (R. pp. 43-44) (emphasis added). The court explained that Respondents spent two years of discovery without knowledge that an investigation occurred and without responsive documents. (R. p. 44). After Respondents specifically told Boggs they needed complete responses before two Rule 30(b)(6) depositions, they still took the depositions with incomplete and false responses in hand.[7] (R. p. 44). The court found "that Boggs cannot be believed when it says that everything responsive has been produced." (R. p. 44). Respondents twice participated in mediations without truthful discovery responses. The finding of prejudice is fully supported by the record.

Boggs criticizes the lower court's citation to *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987), and argues that the court "abused its discretion by holding that prejudice is presumed merely because Respondents 'lost opportunities in discovery.'" (Br. of App. p. 46). First, the Supreme Court recently reiterated that "[d]iscovery is the quintessence of preparation for

[7] When Respondents moved to compel Boggs to produce a signed verification of the discovery responses, they specifically told Boggs that they would be prejudiced without the ability to question a Rule 30(b)(6) witness without verified answers. (R. pp. 144-45). Boggs was on notice of prejudice related to the truthfulness of its responses.

trial and, when discovery rights are trampled, prejudice must be presumed." *Welch v. Advance Auto. Parts, Inc.*, 445 S.C. 640, 656, 916 S.E.2d 320, 328 (2025) (internal quotation marks omitted). Second, as explained above, the lower court did not base its prejudice finding only on lost opportunities but also on time spent in two Rule 30(b)(6) depositions without truthful discovery responses where the newly-discovered documents "were highly relevant to both of those depositions." (R. pp. 44-45).

Boggs argues there is no prejudice because it "supplemented its document production months before trial."[8] (Br. of App. p. 47). Stated differently, Boggs argues that it is okay for a party to withhold discovery and make false statements in discovery but, as long as they come clean with some time before trial, there is no prejudice. There is no support for that position. It is contrary to the law that "[t]he discovery process is designed to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the **fullest practicable extent**." *Welch*, 445 S.C. at 656, 916 S.E.2d at 329 (internal quotation marks omitted) (emphasis added). The human realities of this situation undeniably show prejudice. Ryan Cobb suffered catastrophic injuries, including the loss of his leg. He suffered the loss of his livelihood when Cobb Trucking had to close its operations. Malon Cobb suffered a debilitating brain injury. During the litigation, the Respondents' medical bills, expenses, and mental hardship continue to compound. Boggs's conduct prolonged this litigation and, if not discovered, would have resulted

[8] Boggs cites to *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011), for the proposition that there is no prejudice when a party cures its discovery failures before trial. (Br. of App. p. 47). *CFRE* does not say that. In *CFRE*, the defendant did not formally answer any standard discovery but, before trial, produced documents to the court that "created a complete record of the facts." *Id.* at 83, 716 S.E.2d at 886. The Supreme Court held that there was not a presumption of prejudice because the defendant showed a lack of prejudice. *Id.* It did not hold that finally producing withheld documents, if done before trial, precludes a finding of prejudice.

in an outcome based on false information. The lower court correctly characterized Boggs's prejudice argument as "no harm, no foul" and rejected it. (R. p. 45).

Finally, Boggs argues that there is no prejudice because the newly-produced materials "have a low impact on the merits of the case." (Br. of App. p. 46). This is Boggs's opinion. Respondents disagree. The withheld documents are directly relevant and important to the case. For example, the email that revealed the discovery failures relates to a disputed issue—whether the traffic control signs were in place at the time of the accident. (R. pp. 408, 457). The parties disagree as to the meaning of the email—whether it shows Boggs trying to get a back-dated compliance report—and that disagreement goes to the merits of a disputed issue in the case. This communication dramatically altered the landscape of litigation with only weeks left before a date-certain trial.

Respondents went to great lengths to give Boggs the benefit of the doubt. They accepted the verification under oath stating that documents did not exist. They accepted Boggs's testimony (via Mr. Hayes under Rule 30(b)(6)) that only two emails existed about this massive collision. This all turned out to be untrue, and Boggs should not now be able to say it does not matter. Boggs's conduct prejudiced Respondents. The lower court applied the proper law to determine prejudice, and the evidence supports its findings. This Court should affirm.

VII. The lower court did not strike Boggs's crossclaim.

The lower court's order states that "Boggs Contracting Inc.'s Answer to Plaintiff's Amended Complaint is hereby STRICKEN." (R. p. 47). It did not strike Boggs's crossclaim. Boggs raised this issue in its motion to reconsider, and Respondents stated in their memorandum in opposition that "Plaintiffs do not believe that the Order struck Boggs' Cross Claim against Heritage Hauling. Rather, the Order clearly only struck Boggs' Answer to Plaintiffs' Amended

Complaint. Plaintiffs do not believe any further modification to the Order is necessary." (R. p. 535). The lower court denied the motion to reconsider in a Form 4 Order. (R. p. 49).

There is nothing "ambiguous" about the court's ruling. (Br. of App. p. 49). Boggs raised this concern and, considering Respondents' position that the court did not strike the crossclaim, the lower court denied the motion to reconsider. This is sufficiently clear that the court did not strike Boggs's cross claim. *See Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002) ("[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions."). Because the lower court did not strike Boggs's crossclaim, there is nothing for this Court to address on appeal.

Finally, Boggs's argument on this issue does not cite to any authority, and should be considered abandoned. *See Pampu v. Wingo*, 918 S.E.2d 717 (Ct. App. 2025) ("[Appellant] does not cite any authority to the contrary. Therefore, he has abandoned this argument.").

There is no abuse of discretion, and this Court should affirm.

CONCLUSION

Boggs gave false discovery responses, false deposition testimony, and a false verification. It withheld discovery materials for two years. This is sanctionable conduct. The lower court carefully considered the evidence, arguments, and the law before properly exercising discretion to sanction Boggs by striking its Answer under the court's inherent powers. The law and evidence fully support that exercise of discretion. There is no basis to overturn it.

For these reasons, the Court should affirm the decisions of the lower court and remand for further proceedings.

December 10, 2025

Respectfully submitted,

s/Kathleen C. Barnes
Kathleen C. Barnes, SC Bar No. 78854
kbarnes@barneslawfirmsc.com
BARNES LAW FIRM, LLC
P.O. Box 897
Hampton, South Carolina 29924
Phone: 803-943-4529

JERRY L SPIVEY LAW FIRM
Jerry L. Spivey, Esquire
Jspivey1@ec.rr.com
(admitted Pro Hac Vice)
206 N. 4th Steet, Ste 2
Wilmington, NC 28401

EVANS MOORE, LLC
Scott C. Evans, SC Bar No. 77684
scott@evansmoorelaw.com
James B. Moore, III, SC Bar No. 74268
James@evansmoorelaw.com
George W. Bryan, III, SC Bar No. 104088
george@evansmoorelaw.com
121 Screven Street
Georgetown, SC 29440

CULBRETH LAW FIRM
Stephen E. Culbreth, Esquire
culbrethlaw@juno.com
(admitted Pro Hac Vice)
PO Box 446
Wilmington, NC 28402

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

David P. Caraker, Circuit Court Judge

Appellate Case No. 2025-001074

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

v.

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

of which Boggs Contracting, Inc. is the…….……..……..Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR, and with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

December 10, 2025

s/Kathleen C. Barnes
Kathleen Chewning Barnes, SC Bar No. 78854
P.O. Box 897
Hampton, SC 29924
803-943-4529