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SC Court of Appeals

IN 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
Civil Action No. 2022-CP-22-00739

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 REPLY BRIEF OF APPELLANT BOGGS CONTRACTING, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

I. Respondents' claim that a circuit court can find no discovery sanctions are warranted under Rule 37 but still strike a party's answer based only on the court's inherent power is not supported by any legal authority and violates Boggs Contracting's right to due process. 1

II. Respondents incorrectly apply the scope and meaning of Rule 30(b)(6)..... 3

III. Respondents' arguments depend heavily on a single case law opinion, but that case is not applicable to the facts or context of this case. 7

IV. Respondents incorrectly argue the Circuit Court did not find the discovery shortcomings were solely attributable to Boggs Contracting itself..... 11

V. Respondents rely heavily on their argumentative mischaracterization of "false statements under oath," but this is not supported by the record. 12

A. Affirmation signed by Mr. Hayes on April 17, 2024. 12

B. Mr. Hayes' deposition testimony as a corporate representative of Boggs Contracting..... 14

C. Mr. Hayes' Affidavit in support of Boggs Contracting's Response in Opposition to Respondents' Motion for Sanctions. 15

VI. Boggs Contracting's due process and criminal contempt arguments are properly preserved for this Court's review. 16

VII. Respondents incorrectly argue that striking a defendant's answer does not place the defendant in default..... 17

VIII. Respondents incorrectly argue that a defendant can continue to maintain a cross-claim against another defendant after its answer is stricken from the record. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Brandt v. Gooding,
368 S.C. 618, 630 S.E.2d 259 (2006) 16

Burkhalter v. Townsend,
139 S.C. 324, 138 S.E. 34 (1927) 17

Byrd v. Irmo High Sch.,
321 S.C. 426, 468 S.E.2d 861 (1996) 1

Coryn Grp. II, LLC v. O.C. Seacrets, Inc.,
265 F.R.D. 235 (D. Md. 2010) 7

Davis v. Parkview Apartments,
409 S.C. 266, 762 S.E.2d 535 (2014) 2

Ethox Chem., LLC v. Coca-Cola Co.,
No. 6:12-CV-01682-TMC, 2014 WL 2719214 (D.S.C. June 16, 2014) 6

Etiwan Fertilizer Co. v. Johns,
202 S.C. 29, 24 S.E.2d 74 (1943) 18

Fuentes v. Classica Cruise Operator Ltd, Inc.,
32 F.4th 1311 (11th Cir. 2022) 6

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.,
334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) 2, 17

In re Anonymous Member of S.C. Bar,
346 S.C. 177, 552 S.E.2d 10 (2001) 6

Int'l Ass'n of Machinists and Aerospace Workers v. Werner-Masuda,
390 F. Supp. 2d 479 (D. Md. 2005) 7

Kosciusko v. Parham,
428 S.C. 481, 836 S.E.2d 362 (Ct. App. 2019) 1

McNair v. Fairfield Cnty.,
379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) 2

Orlando v. Boyd,
320 S.C. 509, 466 S.E.2d 353 (1996) 18

Power Home Solar, LLC v. Sigora Solar, LLC,
339 F.R.D. 64 (W.D. Va. 2021) 6

QZO, Inc. v. Moyer,
358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004) 3

Stark Truss Co. v. Superior Const. Corp.,
360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004) 18

Thynes v. Lloyd,
294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987) 17

Valentine v. Davis,
319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995) 2

Virginia Dep't of Corrs. v. Jordan,
921 F.3d 180 (4th Cir. 2019) 5

Welch v. Advance Auto Parts, Inc.,
445 S.C. 640, 916 S.E.2d 320 (2025) 7, 8, 9, 10

Statutes and Court Rules

Rule 13(g), SCRCP 18

Rule 30(b)(6), SCRCP 4

Rule 37, SCRCP 3, 10

Rule 55, SCRCP 17

Rule 7, SCRCP 18

REPLY ARGUMENT

Appellant Boggs Contracting, Inc. ("Boggs Contracting")[1] respectfully submits the following discrete arguments in reply to arguments and authorities set forth in Respondents' appellate brief.

I. Respondents' claim that a circuit court can find no discovery sanctions are warranted under Rule 37 but still strike a party's answer based only on the court's inherent power is not supported by any legal authority and violates Boggs Contracting's right to due process.

Respondents twice make the unsupported claim that a circuit court can find no discovery sanctions are warranted under Rule 37 because there was no violation of a court order but still strike a party's answer based only on the court's inherent power. (Resp. Br. pp. 18, 22.) However, there is no legal authority to bypass Rule 37's provision for discovery sanctions for failure to comply with a court order and still issue discovery sanctions based only on the court's inherent powers, and doing so violates Boggs Contracting's right to due process. Specific procedural rules, such as Rule 37, take precedence over the Circuit Court's general inherent powers. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 435, 468 S.E.2d 861, 866 (1996) ("The general rule of statutory construction is that a specific statute prevails over a more general one."). *See also, e.g.*, *Kosciusko v. Parham*, 428 S.C. 481, 497-98, 836 S.E.2d 362, 371 (Ct. App. 2019) (holding Rule 4(d)(5)'s silence regarding binding arbitration of certain issues did not give the lower court authority to submit those issues to arbitration).

[1] Respondents refer to Boggs Contracting throughout their brief as "Boggs." However, Boggs Contracting requests that the Court and Respondents refer to it as "Boggs Contracting" to avoid creating ambiguity in the record. At least two other, distinct corporate entities with "Boggs" in their names have been referenced in this case before the Circuit Court—Boggs Transport, Inc. and Boggs Materials, Inc.—in addition to an individual with the last name Boggs. To maintain the correct identities of all persons and entities, Boggs Contracting should be identified as "Boggs Contracting."

Respondents' argument that a party is not entitled to an order providing notice from the court that the party is out of compliance with discovery obligations before issuing a nuclear discovery sanction similarly fails. Respondents ignore the plain language of Rule 37, which ensures a party has notice of the possibility of sanctions in discovery disputes by establishing a uniform procedure to compel discovery and issue sanctions. Whereas a finding that there is no basis for sanctions under Rule 37 yet still striking a defendant's answer is illogical, following Rule 37 ensures the sanctioned party has notice through the court's order of the deficiencies in its discovery and an opportunity to correct those deficiencies to avoid being sanctioned.[2] *See Valentine v. Davis*, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995) (holding the continuity and uniformity of the Rules of Civil Procedure are essential to the orderly administration of the legal system). Respondents also ignore the precedent followed by many courts of only striking a defendant's answer after giving warnings and opportunities for correction beyond just those afforded by entering an order compelling discovery. *See, e.g.*, *Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (finding the Circuit Court appropriately struck a party's answer after it gave the party "ample opportunity to amend their discovery responses both before and after he issued the Discovery Order"); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 196, 511 S.E.2d 716, 718 (Ct. App. 1999) (striking a party's answer only after it violated multiple discovery orders, including one which cautioned the court would consider striking the party's answer if it failed to comply with the order); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 831 (Ct. App. 2008) (upholding a sanction striking a party's answer

[2] An order compelling discovery is also necessary to appropriately limit the scope of the compelled discovery within the bounds of discovery permitted by Rule 26, SCRCP. It is undeniable that a party should not be sanctioned for not responding to impermissible discovery requests.

after the Circuit Court "warned it was inclined to strike the answer" if the party did not resolve the discovery issues in 45 days).

Respondents cite a single case, *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004), to support their claim that a court is not required to give any advance notice before striking a defendant's answer as a sanction, but that is not what *Moyer* held. (Resp. Br. p. 22.) The defendant in *Moyer* was sanctioned for destroying evidence on his computer after the court ordered him to surrender the computer. *QZO, Inc. v. Moyer*, 358 S.C. at 251, 594 S.E.2d at 544. Thus, the *Moyer* defendant had proper notice before sanctions were issued because the court followed the procedure required by Rule 37, SCRCP, to issue the sanction after he refused to comply with the court's order.

Contrary to all available precedent, the Circuit Court did not afford Boggs Contracting any such notice. The court never entered any order providing notice to Boggs Contracting that it was out of compliance with discovery obligations. Even in the order striking Boggs Contracting's answer, the Circuit Court did not find any basis for Rule 37 sanctions because Boggs Contracting never violated a court order. Instead, the Circuit Court proceeded to *sua sponte* issue a sanction pursuant to the court's inherent powers. The Circuit Court failed to give Boggs Contracting any forewarning that it was out of compliance with discovery obligations or an opportunity to address the court's findings and come into compliance. Boggs Contracting did not even have constructive notice that the court might decline to issue sanctions under Rule 37 yet still strike its answer based solely on its inherent power, because no known South Carolina court has ever exercised its inherent power to supersede the Rules of Civil Procedure to strike a defendant's answer as a discovery sanction.

II. Respondents incorrectly apply the scope and meaning of Rule 30(b)(6).

Respondents incorrectly apply the scope and meaning of Rule 30(b)(6) to mean that a designated witness somehow morphs into and becomes the corporate entity, rather than testifying

on behalf of the corporate entity, which creates a material difference when the witness is not able to testify as to all matters known or reasonably available to the corporate entity. Rule 30(b)(6) provides the mechanism for conducting a deposition of a corporate entity, allowing the party seeking the deposition to "describe with reasonable particularity the matters on which examination is requested" and requiring the corporate entity to designate one or more persons who "shall testify as to matters known or reasonably available to the organization." Rule 30(b)(6), SCRCP. When the corporate entity designates a witness to testify on its behalf, the witness's testimony is binding upon the corporation as to the topics for which the witness was designated to testify.

With no basis, Respondents' brief repeatedly implies that the Rule 30(b)(6) witness presented to testify on behalf of Boggs Contracting did not merely testify on behalf of the corporate entity, but actually morphed into and became Boggs Contracting while testifying. At least three times, Respondents argue that Kevin J. Hayes, Jr. testified "as Boggs" (Resp. Br. pp. 9, 26), conveying the implication that the Rule 30(b)(6) witness is the corporate entity.[3] Each time, Respondents argue—incorrectly—that inaccuracies in the witness's testimony necessarily mean the corporate entity itself knowingly misrepresented the facts. This assertion is a gross mischaracterization of any valid interpretation of Rule 30(b)(6).

Respondents' argument goes off course with the implication that any statement made by the witness is made by the corporate entity, even if the witness states that he cannot speak to all matters known to the organization and is only testifying to the best of his personal knowledge. However, as stated in the Rule itself, the witness does not become the corporate entity; he testifies on the corporate entity's behalf as to matters known or reasonably available to it. *See also, e.g.,*

[3] Even more egregiously, Respondents go as far as to argue, with no basis or authority, that Mr. Hayes was acting "as Boggs" outside the deposition, when he was reviewing materials to prepare to testify on behalf of Boggs Contracting. (Resp. Br. p. 33.)

Virginia Dep't of Corrs. v. Jordan, 921 F.3d 180, 193 (4th Cir. 2019) ("Rule 30(b)(6) deponents testify on behalf of entities, not themselves . . . ." (emphasis added)).

The crucial distinction is that, if a Rule 30(b)(6) witness can only answer a question to the best of his own personal knowledge and not with the company's corporate knowledge, it simply means that the witness is not sufficiently prepared. It does not mean the company is intentionally offering untrue testimony under oath, as Respondents claim. This distinction cannot be overlooked, as the degree of culpability is materially different between a named, corporate party intentionally presenting false information under oath and an unintentional lack of knowledge by an unprepared, non-party individual.

As explained in Boggs Contracting's opening brief, in the testimony underlying Respondents' complaints, the witness at issue did not have knowledge of all "matters known or reasonably available to the organization." He specifically testified that he was providing his own personal knowledge. At the time of his testimony, Mr. Hayes did not know that there were additional responsive documents and emails about the incident that had not yet been located by Boggs Contracting. Mr. Hayes explained, however, that his knowledge was based on information received after he asked the employees involved in the paving project where the accident occurred to search their inboxes for responsive communications. Boggs Contracting now knows documents existed that were not identified by Mr. Hayes during his deposition preparation, but Mr. Hayes did not know about these documents when he testified.

When a Rule 30(b)(6) witness makes a statement to the best of his personal knowledge that he believes to be correct but that later is found to be incorrect, Respondents use the "as Boggs" mischaracterization to argue that the corporate entity itself has knowingly testified falsely. However, this is far from an accurate portrayal of the purpose and effect of deposition testimony

under Rule 30(b)(6), as it fails to allow for the witness who is not able to testify with the corporate entity's knowledge.

To be clear, Boggs Contracting acknowledges that a Rule 30(b)(6) witness who is not sufficiently prepared to testify as to all matters known or reasonably available to the corporate entity regarding designated topics is still a failure to comply with the requirements of Rule 30(b)(6). Importantly, there is a substantial body of case law on the effects of an improperly prepared Rule 30(b)(6) witness. It is common when a witness is not able to testify properly with the company's knowledge for a court to issue sanctions aimed at remedying the specific shortcoming, such as requiring the company to present an additional, properly prepared witness at its own expense and possibly, in extreme circumstances, an award of fees and costs incurred by the deposing party to take the additional deposition. *See, e.g.*, *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001) (listing multiple remedies for deposition misconduct, including an award of reasonable expenses); *Ethox Chem., LLC v. Coca-Cola Co.*, No. 6:12-CV-01682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014) (requiring defendant to produce additional witnesses prepared to testify with the corporation's knowledge but denying plaintiff's request for reimbursement of costs and fees associated with re-conducting the depositions); *Fuentes v. Classica Cruise Operator Ltd, Inc.*, 32 F.4th 1311 (11th Cir. 2022) (declining to issue sanctions because a corporate representative failed to recall portions of relevant information during his deposition and noting it would have been appropriate to reopen the deposition at the corporation's expense); *Power Home Solar, LLC v. Sigora Solar, LLC*, 339 F.R.D. 64, 90 (W.D. Va. 2021) (granting attorneys' fees and costs to reopen a 30(b)(6) deposition but declining to strike the party's answer as a sanction and noting the court must give "clear and explicit warning" before issuing such a severe sanction); *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*,

265 F.R.D. 235, 239 (D. Md. 2010) (reopening a corporate deposition at the corporation's expense and requiring it to put forth a fully prepared witness as a sanction for not properly preparing the witness for the deposition); *Int'l Ass'n of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 489-90 (D. Md. 2005) (granting motion for sanctions in the form of fees for the deposition of first, unprepared corporate witness and partial fees for the second witness).

Importantly, however, the nuclear sanction of striking a defendant's answer because a Rule 30(b)(6) witness was not sufficiently prepared to testify on behalf of the company goes far beyond anything that is necessary or appropriate to remedy the shortcoming.

III. Respondents' arguments depend heavily on a single case law opinion, but that case is not applicable to the facts or context of this case.

Respondents' argument depends heavily on *Welch v. Advance Auto Parts, Inc.*, 445 S.C. 640, 916 S.E.2d 320 (2025), citing the case ten times (so much that it is the only case referenced as "passim" in Respondents' Table of Authorities). However, *Welch* is not applicable to the facts or context of this case, and Respondents' substantial dependence on an inapplicable case demonstrates that the applicable case law does not support Respondents' position.

The *Welch* opinion was issued after the Circuit Court's Orders on appeal in this case, and as of the date of this filing, *Welch* is still proceeding through the appellate process.[4] *Welch* is distinguishable and inapplicable in this case because both the nature and the degree of the

[4] The Circuit Court's Order denying Boggs Contracting's motion for reconsideration in this case was issued on May 20, 2025. The *Welch* opinion was issued on May 21, 2025. Boggs Contracting filed its Notice of Appeal in this case on June 2, 2025. As of the date of this filing, a petition for writ of certiorari in *Welch* is presently pending with the United States Supreme Court, asking the Supreme Court to address constitutional due process issues of a court's personal jurisdiction and *in rem* jurisdiction over property not located within the state. Petition For A Writ of Certiorari To The Supreme Court of South Carolina, *Atlas Turner, Inc. v. Welch*, No. 25-213 (Aug. 21, 2025). Presumably, a finding that the South Carolina courts did not properly exercise jurisdiction in *Welch* over the sanctioned defendant or over property would affect the *Welch* court's findings regarding discovery sanctions.

sanctioned conduct, as well as the facts, procedure, and legal issues, were completely different than anything alleged in this case.

Welch arose as an appeal from the dedicated South Carolina asbestos docket. The sanctioned defendant was a Canadian company that produced and sold asbestos insulation and filed a motion to dismiss the claims against it, contending it was not subject to personal jurisdiction in South Carolina. *Welch*, 445 S.C. at 649, 916 S.E.2d at 325. Whereas "[c]ases on the docket are subject to standard mandatory discovery procedures and scheduling orders so they may be timely resolved," the sanctioned defendant contended it was not required to participate in discovery in the lawsuit. *Id.* The circuit court rejected these contentions and ordered the sanctioned defendant to participate in discovery. *Id.* The sanctioned defendant refused to comply with the court's order, intentionally ignoring multiple Rule 30(b)(6) deposition notices served upon it. *Id.* "The trial court warned [the sanctioned defendant] that if it did not cooperate with the Rule 30(b)(6) notices and answer other pending discovery, it would be sanctioned and possibly held in contempt." *Id.* Even after the court's intervention, the sanctioned defendant still "refused to respond to <u>any discovery</u>, even jurisdictional discovery . . . ordered by the trial court. It claimed it would not produce a Rule 30(b)(6) witness at the scheduled deposition time <u>'or ever.'</u>" *Id.* (emphasis added).

Only after this deliberate and complete refusal to comply with multiple court orders, the circuit court then "held [the sanctioned defendant] in contempt for its 'willful and intentional' refusal to comply <u>with court ordered discovery</u>. As a sanction, the trial court struck [the sanctioned defendant's] answer, placing it in default." *Id.* at 650, 916 S.E.2d at 325 (emphasis added).[5]

[5] Contrary to Respondents' unsupported argument on another issue, the *Welch* court correctly recognized the basic principle that striking a defendant's answer *per se* places that defendant in default.

The *Welch* court took issue with the sanctioned defendant's approach to the lawsuit in its entirety, finding it was more than a party merely objecting to jurisdiction and seeking to assert a collateral challenge. Observing that "the record overflows with examples of [the sanctioned defendant's] cavalier disdain of the elementary rules of civil procedure," *id.*, the court described the sanctioned defendant's overall conduct as "moral fraud against the trial court, the state of South Carolina, and Respondent." *Id.* at 662, 916 S.E.2d at 332 (emphasis added). The Court stated:

> [The sanctioned defendant's] strident and outspoken refusal to comply with the trial court's orders convinces us it will continue to act in bad faith as the case against it progresses. It is not lost upon us that [the sanctioned defendant] has long experience as a defendant in asbestos cases. We note too that when faced with lawsuits—for allegedly causing serious injury and death to American workers and citizens related to the pernicious products it sold for profit even after the lethal risk these products posed was known—its tactic has been to claim that, if the courts exerted jurisdiction over them, it would offend the "traditional notions of fair play and substantial justice" due process guarantees. When that ploy fails, [the sanctioned defendant's] version of due process is to refuse to abide by court orders requiring it to answer basic information. It is alleged [the sanctioned defendant] has come into our state, turned profits by selling its hazardous wares in our state, and inflicted grievous harm on citizens in our state. Then, when the shadow of the courthouse door falls upon it, it insists it was never here, and if a court asks anything else about it, it responds: we have nobody who knows anything. The sanctioned defendant seems to claim its corporate form allows it to "both be and not be."
>
> We conclude [the sanctioned defendant's] conduct justified the appointment of a Receiver before judgment. First, [the sanctioned defendant's] contemptuous disregard of the court's discovery orders and other conduct demonstrates it is seeking to evade its responsibilities as a civil litigant. There is evidence that [the sanctioned defendant's] corporate policy for responding to asbestos lawsuits is to adopt a "minimum defense posture" and incur default judgments. The sanctioned defendant followed that policy here. Second, the sanctioned defendant represented to the trial court that it had no Insurance Assets relevant to these cases. However, there is evidence the sanctioned defendant was involved in a transaction that may have compromised some of its potential insurance coverage. The record further discloses that the sanctioned

> defendant has refused to tender its policies to certain insurers for defense and indemnity.

Id. at 660-61, 916 S.E.2d at 331 (internal citations omitted).

The nature and degree of the allegations made against Boggs Contracting stand in sharp contrast to the sanctioned defendant in *Welch*. Relying specifically on Rule 37, SCRCP, which the Circuit Court in this case expressly rejected, the *Welch* court found that the "harsh medicine" of striking a defendant's answer was warranted specifically because the defendant refused to participate in discovery at all, willfully violated multiple court orders requiring it to do so, and caused prejudice to the plaintiff by taking the position that it would never produce the information sought in discovery. The Supreme Court explained that the sanctioned defendant "was emphatic that it did not intend to comply with repeated discovery orders issued by the trial court. The trial court did not need to spell out what all involved knew: that the nature of the discovery at issue was the very right to discovery itself, in all its stages." *Id.* at 656, 916 S.E.2d at 328.

Here, however, there is no allegation or evidence that Boggs Contracting refused to respond to written discovery. The record shows that Boggs Contracting responded to every discovery request propounded upon it, and the issue is Respondents' contention that the responses were deficient, which was not intentional. There is also no allegation or evidence that Boggs Contracting refused to respond to produce a Rule 30(b)(6) deposition witness. The record shows that Boggs Contracting produced two Rule 30(b)(6) witnesses, and the issue is Respondents' disputed contention that the witnesses testified untruthfully.

Unlike *Welch*, there is also no allegation that Boggs Contracting violated any court order, and it is undisputed that it never did. While Respondents have set forth a creative theory that Boggs Contracting manipulated the procedure to avoid entry of a court order while still concealing information, which Boggs Contracting denies, even this theory distinguishes this case from *Welch*.

Unlike this case, the sanctioned defendant in *Welch* did not give any party or the court any opportunity to assess any information in discovery. And unlike this case, there was no mention in *Welch* of imposing a sanction based only on the court's inherent power after declining to issue sanctions under Rule 37.

Again unlike *Welch*, the record does not support that Respondents were prejudiced by the inability to obtain information sought in discovery in a reasonable time before trial. The record shows that Boggs Contracting produced all requested documentation before the hearing on Respondents' motion for sanctions, months before ethe expected trial date, and with many depositions and much discovery remaining to be conducted. Unlike *Welch*, the issue in this case is Respondents' complaint that the information was produced late, not that the defendant affirmatively declared it would never respond to discovery. Unlike *Welch*, that shortcoming was remedied with abundant opportunity for Respondents to completely prepare their case for trial.

The fact that Respondents' arguments depend heavily on *Welch* demonstrates that the applicable case law does not support Respondents' position. The *Welch* opinion was issued after the Circuit Court's Orders on appeal in this case, and it is distinguishable and inapplicable in this case because both the nature and the degree of the sanctioned conduct were completely different than anything alleged in this case. The Court should recognize that Respondents' reliance upon it is merely an attempt to bootstrap an argument that is not supported by applicable law.

IV. Respondents incorrectly argue the Circuit Court did not find the discovery shortcomings were solely attributable to Boggs Contracting itself.

Respondents incorrectly argue the Circuit Court did not attribute the discovery shortcomings solely to Boggs Contracting, but this is exactly what the Circuit Court found. The Circuit Court stated its "ruling in no way touches upon the actions of any of the lawyers involved," (Order p. 8; R. p. 42), and was "in no way a comment . . . upon the actions of any of the lawyers

that were, or are, involved in this case." (Order p. 13; R. p. 47.) Respondents misconstrue Boggs Contracting's argument by incorrectly saying Boggs Contracting blames the discovery shortcomings on others. This is not Boggs Contracting's argument. Rather, Boggs Contracting's argument is that the Circuit Court erred and abused its discretion by expressly finding that the discovery shortcomings were attributable solely to Boggs Contracting itself, which is not supported by the record.

V. Respondents rely heavily on their argumentative mischaracterization of "false statements under oath," but this is not supported by the record.

Respondents' argument hinges on an argumentative mischaracterization of three statements that were given under oath by Mr. Hayes: (1) his signed Affirmation provided by Appellants on April 17, 2024; (2) his testimony during a Rule 30(b)(6) deposition on April 24, 2024; and (3) the affidavit he signed in support of Boggs Contracting's Response in Opposition to Respondents' Motion for Sanctions.

A. Affirmation signed by Mr. Hayes on April 17, 2024.

Respondents incorrectly argue multiple times in their appellate brief that Kevin J. Hayes, Jr. signed a verification of Boggs Contracting's Rule 34 responses to requests for production "as Boggs." (Resp. Br. pp. 26, 33.) However, there is nothing in the record to support this factually inaccurate assertion. The Record clearly shows it was made only by Mr. Hayes himself, was based only on his own personal knowledge, and expressly contemplated that additional documents may be discovered.

Respondents imply that Boggs Contracting somehow was obligated or expected to verify its Rule 34 request for production responses in a capacity comparable to a Rule 30(b)(6) deposition witness who testifies on behalf of the company with the company's corporate knowledge. However, there is no requirement in the Rules of Civil Procedure for responses to Rule 34 Requests

for Production to be verified by anyone. Boggs Contracting's counsel agreed to provide a verification in a context unique to this case, because Respondents' counsel requested it in light of the discovery dispute that was ongoing.

As Respondents state, Boggs Contracting's counsel notified Respondents' counsel that they would "provide a verification to these responses [to Rule 34 Requests for Production] signed by a representative of Boggs [Contracting]." (Exh. 14 to Mot. for Sanctions; R. p. 381.) However, nothing in the record supports Respondents' implication that Boggs Contracting was expected to bind the corporation to a certification of the company's full corporate knowledge regarding the responses to Requests for Production. The agreement was merely that Boggs Contracting would go above the requirements of the Rules of Civil Procedure to have a representative sign a verification.

In keeping with the agreement, Boggs Contracting produced a document titled "Affirmation Per Rule 33, SCRCP,"[6] which stated:

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

(4/17/2024 Affirmation; R. p. 397.)

Respondents argue that the statements in the Affirmation "are statements of Boggs [Contracting] based on its corporate knowledge. They are not individual statements of Mr. Hayes based on his personal knowledge." (Resp. Br. p. 8.) However, there is no basis for this assertion. It is not supported by any Rule or other authority, and it contradicts the plain language of the

[6] It appears the reference to "Rule 33" was a typographical error, as the referenced responses were Rule 34 responses to Requests for Production.

Affirmation itself. The Affirmation stated that Mr. Hayes affirmed that the responses to Requests for Production were true and accurate to the best of his knowledge. There was no implication that the Affirmation was a statement by Boggs Contracting based on its corporate knowledge. Importantly, the Affirmation specifically contemplated that documents may have existed that were outside Mr. Hayes' personal knowledge, and it expressly acknowledged the possibility that additional information could be discovered.

The fact that the Affirmation was made only by Mr. Hayes based on his own personal knowledge is of crucial importance because it directly refutes Respondents' contention and the Circuit Court's finding that Boggs Contracting knowingly withheld documents or information from discovery. While it is now known that Boggs Contracting's responses to Respondents' Requests for Production were not complete, there is no basis in the record to assert that Boggs Contracting itself was aware of this shortcoming or knowingly misrepresented any information. This is further evidence that the Circuit Court abused its discretion in striking Boggs Contracting's Answer.

B. Mr. Hayes' deposition testimony as a corporate representative of Boggs Contracting.

Respondents also claim Boggs Contracting made false statements through Mr. Hayes as one of its corporate representatives. Respondents incorrectly claim Mr. Hayes testified that there were only two emails responsive to Respondents' discovery requests, but Mr. Hayes did not make this claim during his deposition at all. (Resp. Br. p. 9.)

Respondents asked Mr. Hayes a specific question about emails pertaining to Boggs Contracting, Heritage Hauling, and the subject incident, and Mr. Hayes responded to that question by stating he was not aware of any additional responsive emails. (Hayes dep. 97:24-99:20; R. p. 97, line 24-p. 99, line 20.) Mr. Hayes never made a blanket statement about all of Respondents'

discovery requests, and his testimony cannot be taken out of context to apply to every discovery request. In sharp contrast to Respondents' repeated mischaracterizations, Mr. Hayes openly acknowledged just a few moments before that it was possible there were additional emails about the incident that he was not aware of because they had not been uncovered in the company's investigation. Mr. Hayes testified clearly that he was not aware of additional emails pertaining to Boggs Contracting, Heritage Hauling, and the incident, and he truthfully admitted the possibility that additional emails about the incident could exist.

C. Mr. Hayes' Affidavit in support of Boggs Contracting's Response in Opposition to Respondents' Motion for Sanctions.

Respondents improperly describe Mr. Hayes' affidavit as disingenuous because he affirmed that Boggs Contracting did not know the photos and video taken by an engineering firm were not produced in discovery. (Resp. Br. p. 33.) Respondents point to the Affirmation Mr. Hayes signed before he knew of the photos and video, but Respondents ignore that both statements were made based on Mr. Hayes' personal knowledge at the time. Boggs Contracting does not dispute that the photos and video existed when he signed the Affirmation, but the record shows that he did not know about them, which is exactly what he explained in his affidavit.

The record further shows that neither Boggs Contracting nor its representatives made false statements under oath. Mr. Hayes first affirmed the company's discovery responses based on his personal knowledge of his investigation into the company's search for responsive documents. When testifying as one of the corporate representatives of Boggs Contracting, Mr. Hayes then explained how he searched for responsive documents and acknowledged the possibility that further investigation could uncover additional documents. Finally, when Mr. Hayes learned of the issues with Boggs Contracting's prior discovery responses, he submitted an affidavit to explain when and how he obtained knowledge of these discovery issues. The record shows that Mr. Hayes'

statements were updated as additional information became available as discovery progressed and the company corrected issues with its initial discovery process.

VI. Boggs Contracting's due process and criminal contempt arguments are properly preserved for this Court's review.

Respondents incorrectly claim Boggs Contracting has not preserved its argument that the Circuit Court did not give proper notice of a sanction pursuant to the court's inherent powers, but that is what Boggs Contracting has argued all along, including in its Motion for Reconsideration. Respondents also claim Boggs Contracting did not preserve the argument that the Circuit Court effectively issued a criminal contempt sanction, but Boggs Contracting also raised this argument in its Motion for Reconsideration.

The Circuit Court violated Boggs Contracting's due process rights by issuing a sanction pursuant to the court's inherent powers without prior warning or providing an opportunity for Boggs Contracting to defend itself. Respondents' Motion sought sanctions specifically under Rule 37, and the parties' briefings and oral arguments discussed only Rule 37, not the court's inherent powers. (Mot. for Rec. p. 26; R. p. 487.) It was not until the Circuit Court's Order that the court's inherent powers were referenced as the sole authority for striking Boggs Contracting's Answer. (*Id.* at 2; R. p. 463.) Boggs Contracting raised the lack of prior warning several times in its Motion for Reconsideration, and the Circuit Court ruled on this issue when it denied the Motion.

Boggs Contracting likewise raised the issue of criminal contempt sanctions in its Motion for Reconsideration, but Respondents conflate Boggs Contracting's argument about the inapplicability of *Brandt v. Gooding* to discovery sanctions with its argument that by relying on *Brandt*, the Circuit Court effectively issued a criminal contempt sanction. *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006). The Circuit Court quoted *Brandt* to support the use of its inherent power to "punish for offences," but, as discussed in the Motion for Reconsideration, that quote

applies to sanctions for criminal contempt, not discovery sanctions. (Order p. 7; R. p. 41.) A sanction for criminal contempt is not appropriate against Boggs Contracting, but that is exactly what the Circuit Court ordered by foregoing Rule 37's procedure for discovery sanctions and relying on the *sua sponte* use of its inherent powers. Boggs Contracting raised the issue of the Circuit Court's reliance on case law discussing criminal contempt in its Motion for Reconsideration, and the Circuit Court ruled on this issue when it denied the Motion.

VII. Respondents incorrectly argue that striking a defendant's answer does not place the defendant in default.

Respondents incorrectly argue the Circuit Court did not hold Boggs Contracting in default under Rule 55(c), SCRCP, and they incorrectly claim the law governing default judgment does not apply because the decision to strike Boggs Contracting's Answer was not based on a technicality. (Resp. Br. p. 23.) There is no legal basis for either claim.

A defendant without an answer is a defendant in default. *See Burkhalter v. Townsend*, 139 S.C. 324, 324, 138 S.E. 34, 37 (1927) (holding the effect of striking an answer is "the same as if no answer had been served."). In striking Boggs Contracting's Answer, holding Boggs Contracting in default is exactly what the Circuit Court did.

Under Rule 55, SCRCP, a defendant that does not have an answer on file after the pleading deadline is in default. Once the answer is stricken, the defendant is in default, regardless of whether an entry of default has been noted in the record. *See Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party).

This calculus has been duly recognized by South Carolina courts in the past. *See Griffin Grading & Clearing, Inc.*, 334 S.C. at 198, 511 S.E.2d at 718 ("When the court orders default or

dismissal, *or the sanction itself results in default or dismissal*, the end result is harsh medicine that should not be administered lightly.") (emphasis added); *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) ("Furthermore, '*[w]here the effect will be the same as granting judgment by default or dismissal*, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.'") (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 104, 410 S.E.2d 537, 539 (1991)) (emphasis added).

Contrary to Respondents' assertions, if striking the answer would be the same as if no answer had ever been served—which is a "fail[ure] to plead or otherwise defend" under Rule 55(a)—then there is no other logical outcome than default. Once a party fails to comply with Rule 12(a)'s pleading requirement, they are "technically in default," regardless of if they serve an answer before an entry of default has been entered. *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004).

VIII. Respondents incorrectly argue that a defendant can continue to maintain a cross-claim against another defendant after its answer is stricken from the record.

Respondents incorrectly argue, without any legal authority, that "[t]here is nothing 'ambiguous' about the court's ruling" that purported to strike Boggs Contracting's Answer but not strike Boggs Contracting's cross-claim against a codefendant. (Resp. Br. p. 39.) The statement itself is self-contradictory and inherently ambiguous.

By definition, a cross-claim cannot exist as a stand-alone pleading apart from an answer. Rather, a cross-claim must be contained within a party's answer because the rules prohibit pleadings other than complaints, answers, and replies to counterclaims. Rule 7(a), SCRCP. Rule 7(a) specifies that an answer may "contain" a cross-claim, but there is no provision allowing a cross-claim separate from an answer. *See also* Rule 13(g), SCRCP (cross-claims are stated <u>within</u> other pleadings); *cf. Etiwan Fertilizer Co. v. Johns*, 202 S.C. 29, 24 S.E.2d 74, 75 (1943) (finding

a "counterclaim must be considered as a part of the answer."). Thus, a cross-claim cannot be raised apart from an answer because a cross-claim is not a pleading by itself, and the Circuit Court abused its discretion by issuing a self-contradictory order that purports to strike Boggs Contracting's Answer while leaving in place a cross-claim that cannot exist separately from that answer.

CONCLUSION

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

Respectfully submitted,

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December 15, 2025
Columbia, South Carolina

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SC Court of Appeals

IN 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
Civil Action No. 2022-CP-22-00739

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 COUNSEL

In accordance with Rule 210(c), SCACR, the undersigned Attorney for the Appellant, hereby certifies that his *Final Reply Brief of Appellant Boggs Contracting, Inc.* contains no matter which is irrelevant to the appeal.

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