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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-001681
Case No. 2019-CP-43-1021
Opinion No. 2026-UP-128

Kimberly Welch, as Personal Representative of the Estate of Judy Ann Haselden,..... Respondent,

v.

Michael D. Smoak and Murray Sand Co., Inc.,..... Appellants.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellants have petitioned this Court for a rehearing of its recent unpublished decision in *Welch v. Smoak*, Op. No. 2026-UP-128 (S.C. Ct. App. filed March 18, 2026). The Appellants respectfully submit that the following points were overlooked or misapprehended by this Court and merit a rehearing:

I.

This Court issued an unpublished *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR, although the Court does not specify which provision of Rule 220(b)(1) that it found applicable to the issues raised on appeal. More importantly, the string citations included as the supporting authorities for the memorandum opinion are not dispositive of the issues on

appeal raised by the Appellants and fail to provide the litigants with the bases for the Court's decision to affirm the court below. With all due respect, the issuance of a memorandum opinion has not provided the Appellant with meaningful appellate review as warranted given the nature of the case, the imposition of the harshest sanction available, the due process rights of the Appellants (including Michael Smoak who it is conceded did nothing wrong), and the ultimate monetary impact of the decision.

There is no question that Rule 220(b)(1) has its purpose and has been ruled applicable to the Court of Appeals. *See*, *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 471 S.E.2d 456 (1993). The Appellants are not challenging that authority. Indisputably, there are many appeals coming before our appellate courts that may be properly and efficiently disposed of under Rule 220(b)(1) without infringing on the concepts of due process and fundamental fairness. This is not one of them.

In short, the Appellants submits this is a case that should not be decided pursuant to Rule 220(b) with only string citations of "black letter" law but no legal analysis applying that law to the critical issues presented, including the due process rights of the litigants who have received the harshest civil sanction available. In fact, as discussed further below, there are issues that the Court does not even address by any of those string citations.

II.

In the introductory paragraph of its unpublished opinion, this Court correctly identifies that the Appellants have argued on appeal that the trial court "failed to properly exercise its discretion in considering lesser and more narrowly tailored sanctions to address the misconduct as found." (Slip Op. at 2). Yet, nowhere in the Court's opinion is this issue again mentioned or analyzed or decided. There is not even a string citation devoted to this critical issue on appeal.

Importantly, in *Karppi v. Greenville Terrazzo Co.*, *Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct.

App. 1997), this Court held that "when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless harsh medicine that should not be administered lightly." 489 S.E.2d at 682. As this Court has further recognized, "the sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc*, 303 S.C. 152, 399 S.E.2d 439, 440 (Ct. App. 1990). Additionally, it is imperative that "the sanction should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast." *Id*.

Thus, as required by prevailing South Carolina precedent, it was incumbent on the trial court, before imposing the harshest sanction available, to make the appropriate findings to show that the sanction imposed was "reasonable" and did not "go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation,* 399 S.E.2d at 440. In effect, the trial court must show, in the words of this Court, that it imposed a "rifle-shot" rather than a "shotgun blast." *Id*.

Accordingly, the Respondent was required to show and the trial court was required to find that there are no lesser sanctions available to address the misconduct found. Yet, the trial court only made a conclusory and unsupported finding that "[u]nder the circumstances of this case, that prejudice cannot be remedied by any lesser sanction." (R. 32). The trial court similarly declared without explanation that "the severe sanction of striking Defendants' answer is warranted because nothing else would be adequate." (R. 32). No findings were made to support those conclusory pronouncements.

As the Appellants have demonstrated, and the Respondent likewise failed to refute, the trial court abused its discretion by failing to exercise its discretionary authority. To reiterate, although the trial court states that there was no lesser sanction, the court provides no findings nor any analysis

to show that it considered and rejected any lesser sanction. Instead, it stated in a conclusory manner that there is none. As the Appellants have pointed out, that makes it impossible for an appellate court to do its job and determine whether discretion was actually exercised and whether any error of law occurred. This Court's decision in *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is controlling. In *Samples*, this Court pointed out that the trial court's ruling "in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized." 495 S.E.2d at 216-217. That Supreme Court test provides that "the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. *It should be stated on what basis that discretion was exercised*." 495 S.E.2d at 217, *citing State v. Smith,* 276 S.C. 494, 280 S.E.2d 200, 202 (1981). (Emphasis added).

Thus, it is the highlighted language above that was not followed by the trial court in the case at bar. Notably, in addressing the merits, the Respondent could not say in her brief what lesser sanctions were considered by the trial court and ruled out. Instead, the Respondent baldly claims that "the circuit court was not required to list out the lesser sanctions it considered and explain why they were inadequate." *See*, Respondent's Brief, p. 31. Not surprisingly, no authority is cited for that proposition, and there is none. In fact, that proposition is contrary to the very "Supreme Court analysis" addressed in *Samples*. Logically speaking, it makes sense that a court, when required to exercise discretion, should describe its decision-making and particularly, in this context, the lesser sanctions considered and deemed inadequate and the reasons for that conclusion. Only such fact-finding will demonstrate that discretion was indeed exercised and that the exercise of discretion was not abused or otherwise grounded upon an error of law.

As the Appellants argued and this Court disregarded in its unpublished opinion, the mandate for appropriate fact-finding by the trial court is not unusual. In other contexts where discretion is

exercised, our appellate courts routinely require a showing that discretion was appropriately exercised. For example, the Supreme Court has explained that an exercise of discretion requires *proof* that the decision-maker was "faced with alternatives, actually weighed competing considerations and made a conscious choice." *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 60 (1997). Moreover, for a dismissal based on a failure to prosecute, this Court adopted the federal four-prong test, and the final prong requires the trial court to consider "the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902, 904 (Ct. App. 2006). In deciding the appropriate sanction for discovery abuse, the federal test generally requires an appellate court to examine "whether the district court explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995). *Accord*, *In re Nichols & Associates Tryon Properties, Inc.*, 36 F.3d 1093, *4 (4th Cir. 1994) (table) ("Although the court's order does state that it considered the effectiveness of less drastic sanctions, it does not identify which alternate sanctions it considered or explain why they could not remedy the situation as effectively as a default judgment. We find that such a conclusory statement does not satisfy this court's requirement that a trial court consider the effectiveness of less drastic sanctions").

In their briefs, the Appellants pointed out that a less drastic sanction narrowly tailored to that harm was certainly available. As the Appellants argued, if the trial court truly found that the Respondent was prejudiced because she was barred from bringing a viable claim against Blue Max Trucking, there is no prejudice to the Respondent because this is an admitted case of negligence and there is $2 million in combined primary and excess liability insurance coverage. (R. 712). That coverage is more than adequate to compensate the Respondent for her loss, even if she were to recover in excess of the $600,000 sought by an offer of judgment in August 2023. (R. 518-519). Yet, a lesser sanction would have been to hold the sanctions in abeyance until final judgment, and if

a jury awards more than $2 million, then the court could examine whether there was indeed prejudice by the Respondent not being permitted to pursue some type of negligent selection of independent contractor claim against Blue Max Trucking. However, if the jury awards less than $2 million, clearly there was no prejudice – certainly not prejudice that warrants a "shotgun blast" consisting of the ultimate sanction of striking an answer.

Notably, the Respondent did not discount the aforementioned as a less drastic sanction which would have been much better "aimed at the specific misconduct of the party sanctioned" than the striking of both Appellants' answers. *Balloon Plantation*, 399 S.E.2d at 439. Rather, the Respondent argued that calling this a case of "admitted liability" is "misleading," but the record shows that the Appellants admitted in the Answer to Amended Complaint to "simple negligence" and reserved the right to dispute causation for the decedent's injuries. (R. 370). The Respondent also insisted that the Appellants had "suggested" in their opening brief that the decedent "improperly" stopped at a yellow light. The brief does not suggest any fault on the decedent's part. Moreover, the Respondent disputes whether the $2 million in liability coverage is sufficient, but she makes no mention of her offer of judgment in the amount of $600,000. That offer of judgment is in the record and remains strongly suggestive as to the Respondent's valuation of the damages.

At any rate, the trial court abused its discretion in not considering whether it was appropriate to hold sanctions in abeyance to see whether a jury returned a verdict in excess of the existing insurance coverage. At that point, the court would know if the Respondent was truly prejudiced by her failure to join Blue Max Trucking as an additional party-defendant rather than relying on pure speculation at this point.

This Court, however, has entirely disregarded this key issue and one that clearly demonstrates an abuse of discretion by the trial court. In its unpublished opinion, this Court identifies that the issue was raised, but that is all. The Court never addresses the issue in any

manner. The Court is respectfully requested to grant a rehearing and to fully consider and decide this critical issue raised on appeal. The Appellants further request oral argument on rehearing so that this issue can be fully explored by the Court and the litigants.

III.

The Appellants argued that the trial court abused its discretion by failing to differentiate between the two Appellants – Michael Smoak and Murray Sand Company. The trial court awarded the harshest sanction available against the Appellant Smoak – striking his answer -- even though the court never identified any discovery abuse or misconduct *actually committed by Smoak*. Critically, the Respondent fully conceded that "Appellants are correct that the circuit court did not identify any discovery abuse committed by Smoak." *See*, Respondent's Brief, p. 28.

Yet, despite that *conceded abuse of discretion* by the trial court, this Court ruled that "Appellants' argument that the circuit court failed to differentiate the actions of Smoak and Murray Sand and imputed Murray Sand's conduct to Smoak is not preserved for appellate review because Appellants raised this argument for the first time in their Rule 59(e) … motion to alter or amend." (Slip Op. at 2). With due respect, the Court is mistaken and is requested to rehear this preservation ruling. Under these circumstances, the refusal to consider this issue on a "gotcha" preservation argument ***which has resulted in Smoak having his answer stricken for admittedly no misconduct he committed*** should be deemed a violation of his due process rights. The Court should recognize that that result violates *the very premise of fundamental fairness*.

Importantly, as our appellate courts have consistently stated, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on

preservation grounds when it *clearly* is unpreserved." *Id*. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). Additionally, "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593, 595-96 (2010).

As the record demonstrates, the reversible error committed by the trial court in striking the Appellant Smoak's answer in the absence of any discovery misconduct by him is preserved for appellate review. As the Appellants have shown, the issue of Smoak's culpability for discovery sanctions was addressed during the August 4, 2023 hearing on the motion for sanctions as part of the discussion of this Court's decision in *Karppi, supra*. In fact, it was the Respondent who made the same argument on the merits that she made on appeal, namely that *Karppi* involved "two independent defendants" and that in the case at bar, the Appellants are not "independent" in that they have the "same insurance policy" and the liability is vicarious. (R. 722-723). In effect, as argued during the hearing, the Respondent attempted to impute the alleged misconduct by Murray Sand to Smoak because they "are represented by the same counsel, they are covered under the same liability insurance, and they filed a joint answer to Respondent's amended complaint." *See*, Respondent's Brief, p. 28. Thus, there is no questions that the issue of treating the Appellants "jointly" was raised and discussed by the parties during the hearing. However, the trial court did not expressly address that issue in its order, which made it appropriate for the Appellants to assert it as part of their motion to reconsider.[1]

[1] The Respondent's position in the trial court is also meritless. There is no legal basis for imputing any alleged wrongdoing by Murray Sand to Smoak, and none has been cited by the Respondent, the trial court, or this Court. He was no longer even employed by Murray Sand during

Moreover, it is notable that, in addressing the Rule 59(e) motion, the trial court never stated that the issue was not timely or properly raised, nor did the Respondent make that timeliness argument in defense of the motion to reconsider. Ironically, it is the preservation issue pertaining to the Rule 59(e) motion that has been raised for the first time on appeal.

In sum, the issue of Smoak's discovery abuses was not "clearly unpreserved" as is required to reject an appellate issue on a preservation basis as the foregoing authority from our Supreme Court definitively states. As indicated, fundamental fairness is at stake. Smoak is being severely punished for nothing that he did, nor anything that his counsel did.[2] Smoak has received the harshest civil sanction available; yet, *everyone agrees he did nothing wrong*. How does that not implicate basic fundamental fairness? Accordingly, this Court erred in affirming the sanctions imposed on the Appellant Smoak based on a preservation analysis. The Court is asked to rehear that issue and rule that there is no evidence that Smoak committed any discovery abuses, and on that basis, the trial court abused its discretion in striking Smoak's answer. The Appellant Smoak further requests oral argument on this issue given that his due process rights are definitively at stake.

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the pendency of this litigation. Moreover, the fact that they are insured under the same insurance policy is absolutely immaterial and shows the extremes to which the Respondent has gone to try to justify striking Smoak's answer when, by her own admission, there is no evidence Smoak did anything wrong. Importantly, the fact that both Appellants are represented by the same counsel makes no difference because the trial court explicitly found no evidence of any discovery-related wrongdoing by the Appellants' counsel. Specifically, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21). Therefore, there are no misdeeds by Smoak's counsel for which he may be found responsible. In short, as the Respondent readily admits, there is no finding or evidence that Smoak committed any discovery abuses, and on that basis, it is clear that the trial court abused its discretion in striking Smoak's answer.

[2] To reiterate, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21). Hence, Smoak cannot be sanctioned for conduct by his defense counsel because the trial court made it clear that defense counsel did nothing wrong.

IV.

The Appellants have argued on appeal that the trial court committed errors of law and abused its discretion in granting the Respondent's motion for sanctions and striking the Appellants' answer thereby holding them in default. In addition to the issues discussed above, the Appellants also argued that the trial court erred in concluding the Appellants had violated court orders and abused its discretion in concluding that the production of the three pages of Blue Max Trucking records on September 30, 2021 warranted the striking of the Appellants' answer.

In a conclusive manner, and with no analysis of the issues raised on appeal, this Court simply ruled that there is "evidence support[ing] the circuit court's decision to strike Appellants' answer and hold them in default. Specifically, the evidence showed Appellants violated the circuit court's August 27, 2020 and May 17, 2021 discovery orders; Welch was prejudiced by Appellants' misconduct; and Appellants acted willfully and in bad faith with respect to the production of the Blue Max documents." (Slip Op. at 3). With due respect, the Court's conclusory rulings warrant a rehearing.

As for the Blue Max Trucking documents, the trial court concluded that the Respondent suffered from "irreparable prejudice" because she was barred from joining Blue Max Trucking as a party-defendant to this litigation. However, there is no evidence to suggest that the Respondent had a viable claim against Blue Max Trucking. This is an issue this Court has clearly overlooked or misapprehended. As the Appellants pointed out in their opening brief, South Carolina law is well-settled that a principal "is not vicariously liable for the negligent acts of an independent contractor." *Ruh v. Metal Recycling Services, LLC*, 439 S.C. 649, 889 S.E.2d 577, 579 (2023), *citing Rock Hill Telephone Co. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235, 238 (2005). The Respondent does not refute that point, nor has this Court. This is a rear-end motor vehicle collision. Quite simply, a principal is not liable for the simple negligence of a driver employed by its retained

independent contractor who failed to stop in time when the leading vehicle stopped at a yellow light and was rear-ended. That is not subject to any reasonable dispute.

Nonetheless, in an attempt to circumvent this clear roadblock to her *supposed* vicarious liability claim she was unable to timely commence, the Respondent tries to use the 2023 decision in *Ruh*, in which a claim for negligent selection of an independent contractor was first recognized in South Carolina, to suggest that the Respondent would have brought a viable negligent selection claim prior to February 9, 2020, which is the three-year mark after the accident. However, that is, at the very least, highly speculative, and based on the procedural history of the case, it is highly doubtful. Notably, by the date of February 9, 2020, the Plaintiff had not even pursued any negligent entrustment or negligent hiring or retention claim against Murray Sand based on any driving history of Michael Smoak. (R. 41-45). The Respondent did not amend to include such allegations until after February 9, 2020, when she filed her Amended Complaint on September 3, 2020. (R. 363-368). Nonetheless, the claim for negligent selection of an independent contractor was not part of South Carolina jurisprudence before February 9, 2020, and given the failure to plead a negligent entrustment claim before that date, it is highly speculative and doubtful to predict that the Respondent would have alleged a claim for negligent selection of an independent contractor before that date. Importantly, the trial court did not examine whether there was a legal basis in law and fact for such a claim, and in fact, the court acknowledged that the Respondent's "investigation may have revealed such a claim was not viable." (R. 32). This Court has now committed the same error on appeal. Yet, despite the admittedly speculative nature of a potential claim against Blue Max Trucking, the trial court found sufficient prejudice to the Respondent to impose the harshest sanction available – striking the Appellants' answers. That constitutes an abuse of discretion which respectfully this Court should have recognized and corrected.

Finally, the Appellants have pointed out that the Respondent, like the trial court, repeatedly

makes assumptions and inferences that are not based upon any evidence in the record but rather are premised on pure speculation. In fact, such raw speculation permeates the Respondent's arguments. This Court neither acknowledged nor addressed any of these points in its unpublished opinion.

For instance, the Respondent argues that the trial court should be allowed to speculate that the Appellants "withheld information about Blue Max Trucking for self-serving reasons." (R. 26). First, even the Respondent cannot show and does not even try to show that Michael Smoak withheld any information about Blue Max Trucking.[3] Again, the striking of Smoak's answer is a clear abuse of discretion. Moreover, as to Murray Sand, the Respondent writes "Murray Sand likely agreed to hold Blue Max Trucking harmless from any liability arising from Murray Sand's actions on behalf of Blue Max Trucking." *See*, Respondent's Brief, p. 14. However, by the Respondent's own admission, there is no evidence to support that premise. It is important to remind the Court that the Respondent filed the deposition of Michael Smoak in support of her motion, but no deposition testimony was submitted for Murray Sand. The Respondent, in fact, scheduled and cancelled the Rule 30(b)(6) deposition of Murray Sand on several occasions. Thus, the Respondent had the opportunity to obtain the sworn testimony from Murray Sand and declined to do so. Her own failure to conduct the needed depositions to establish the relief she sought with her motion for sanctions does not give her a pass on meeting her burden of proof. It certainly does not justify or allow her reliance on pure speculation.

Likewise, and most importantly, there is no evidence to support a finding of intentional misconduct or willfulness *by either Appellant*. Again, the Respondent concedes that "Appellants

[3] In its unpublished opinion, this Court found that the evidence shows that "Appellants acted willfully and in bad faith with respect to the production of the Blue Max documents." (Slip Op. at 3). The Court used the plural "Appellants," which is inclusive of the Appellant Smoak. Yet, that is clear error on this Court's part. There is no evidence – and the Respondent admits to this – that Smoak personally did anything wrong and certainly *not that Smoak's conduct was willful and in bad faith*. Once again, this is an example where Smoak has been unfairly denied due process.

are correct that the circuit court did not identify any discovery abuse committed by Smoak." *See*, Respondent's Brief, p. 28. Thus, the striking of Smoak's answer is clearly in error and an abuse of discretion. As to Murray Sand, the Respondent also presented no evidence of bad faith or willful disobedience by any representative of Murray Sand. To reiterate, the burden of proof falls on the Respondent. The Respondent never acknowledges that she had the burden of proof, but that is well established. *See*, *Griffin Grading & Clearing, Inc.*, 334 S.C. 193, 511 S.E.2d 716, 719 (Ct. App. 1999) ("[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross negligence to its rights to justify the sanction"). To reiterate, the Respondent presented no sworn testimony or other evidence to support her claim that Murray Sand personnel acted in bad faith or with willful disobedience or with gross negligence. Importantly, the record contains speculation but no evidence, and as this Court has explained, speculation is not admissible evidence. *See*, *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822, 831 (Ct. App. 2012).

Recognizing this lack of real evidence to support her position and in an apparent attempt to try to uphold the trial court's sanctions award, the Respondent resorted to a new strategy of attacking the actions of defense counsel. For instance, on appeal, the Respondent referred in her brief to "[t]he September 2021 production" as "an improper 'document dump' designed to conceal responsive information." *See*, Respondent's Brief, p. 8. She point blank claims that the so-called "document dump" was "intended to conceal the three-page Blue Max Trucking document that Appellants had withheld up to that point." *Id*. Yet, she presents no evidence that either Smoak or Murray Sand had any role in the "document dump" or tried to conceal anything. That is pure speculation. The same is true with the generalized allegation that the Appellants "misled the Court and Plaintiff." (R. 21). That is also pure speculation. The Appellants made no representations to the trial court, except what was contained in the Smoak deposition transcript. The Respondent, at

least, admits she has no evidence of Smoak's involvement, but as the record reflects, she has no evidence of Murray Sand's involvement either.

Additionally, and most importantly, the Respondent agreed in the trial court that the defense counsel did no wrong. In her motion for sanctions, the Respondent writes: "Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel." (R. 375). Likewise, in its order, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21). That finding has not been appealed by the Respondent, and accordingly, it constitutes the law of the case. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). The Respondent cannot now on appeal take a different position and blame defense counsel because she cannot otherwise meet her burden of proving bad faith or willful disobedience by Michael Smoak or Murray Sand with admissible evidence as opposed to pure speculation. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). This is yet another issue that was overlooked or disregarded by this Court on appeal.

In sum, as outlined in the Appellants' briefs, the trial court committed numerous errors of law that rise to the level of an abuse of discretion. For each of those reasons, and particularly the totality of the circumstances, the sanctions award should have been reversed by this Court. Even if the Court may be correct in concluding that there are discovery abuses committed by one or both Appellants, despite the absence of admissible evidence as opposed to pure speculation, then clearly a less drastic and more narrowly tailored sanction which is a "rifle-shot" that addresses the specific harm would be warranted, but certainly not the striking of the Appellants' answers. That was an

abuse of discretion that should have been overturned by this Court. For these many reasons, a rehearing is warranted and this Court should not rely on Rule 220(b), SCACR, to issue a memorandum opinion for a complex case with substantial legal and dispositive issues and, most critically, the due process rights of the litigants at stake.

CONCLUSION

The Appellants respectfully request that the Court rehear its decision in this case for the reasons argued herein. The Court is requested to reverse the Order of Circuit Court Judge George M. McFaddin, Jr., filed February 12, 2024, and the Form Order denying a subsequent motion for reconsideration and to vacate the sanctions imposed by the trial court in those orders. The Court is also requested to schedule this appeal for oral argument to further address these issues.

Respectfully submitted,

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April 2, 2026

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-001681
Case No. 2019-CP-43-1021

Kimberly Welch, as Personal Representative of the Estate of Judy Ann Haselden,..... Respondent,

v.

Michael D. Smoak and Murray Sand Co., Inc.,..... Appellants.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellants Michael D. Smoak and Murray Sand Company, Inc., does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 2nd day of April 2026, as follows:

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April 2, 2026

Via Email Only
The Honorable Jenny Abbott Kitchings
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Email: ctappfilings@sccourts.org

RE: Kimberly Welch, as Personal Representative of the Estate of Judy Ann Haselden v. Michael D. Smoak and Murray Sand Co., Inc.
Appellate Case Number: 2024-001681
Civil Action Number: 2019-CP-43-1021
Our File Number: 79.20769

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), please find enclosed for filing the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** with regard to the above-referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order. I am forwarding the filing fee via U.S. Mail.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jrs
Enclosure

cc: E. Hood Temple, Esquire *(w/ Enclosure, Via Email Only)*
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