RECEIVED
May 04 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Hon. G.D. Morgan, Jr.

Case No. 2026-000110

IN THE MATTER OF Mary Sloan "Polly" Shoemaker…….Decedent,

James Marshall Shoemaker, III……..Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, and Edward Sloan Shoemaker and Jonathan Evans Shoemaker as Beneficiaries and as Individuals…….……Respondents.

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

s/Wiliam R. McKibbon III
William R. McKibbon III
S.C. Bar #68454
601 E. McBee Ave, Ste. 104
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellant

Opposing counsel:

Jenna Hendricks McLeod
Brown, Massey, Evans, McLeod & Haynsworth, LLC
106 Williams Street
Greenville, SC 29601
T: (864) 271-7424
F: (864) 242-6469
jennamcleod@bmemhlaw.com
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the lower court erred in affirming dismissal where the circuit court record contained affirmative evidence that discovery responses had been served before the Motion to Compel was filed.
2. Whether the lower court erred in affirming dismissal where the record failed to establish bad faith, willfulness, or gross indifference by Appellant.
3. Whether the lower court erred in affirming dismissal where Respondents possessed the responsive materials, delayed their own motions, refused to review documents made available to them, and failed to prove actual prejudice.
4. Whether the lower court erred in affirming dismissal where lesser sanctions were available, the sanction imposed exceeded the necessities of the situation, and no explicit

warning was given by the Court in advance of imposing the ultimate sanction of prejudicial dismissal.

STATEMENT OF THE CASE

This appeal arises from the dismissal of Appellant James Marshall Shoemaker, III's challenge to testamentary instruments executed by his late mother, Mary Sloan "Polly" Shoemaker. Appellant contends the challenged instruments improperly excluded him from substantial inheritance rights and that the controversy concerns significant family assets. (Circuit Court Hearing Transcript, p. 4). Rather than adjudicating those claims on their merits, the Probate Court struck Appellant's pleadings and dismissed the action as a discovery sanction. The Circuit Court affirmed that dismissal, and this appeal followed.

Respondents served interrogatories and requests for production in July 2021. Thereafter, the circuit court record includes a Certificate of Service dated November 29, 2021 together with written interrogatory responses. (Certificate of Service and Interrogatory Responses, pp. 124-143). Only four days later, Respondents filed a Motion to Compel alleging noncompliance. (Motion to Compel, p. 103). Thus, the same record relied upon to support dismissal also contains documentary evidence that written responses had already been served.

The procedural history also reflects significant delay attributable to Respondents' own litigation decisions. Although the Motion to Compel was filed in December 2021, it was not brought to hearing for approximately thirteen months. (Circuit Court Hearing Transcript, p. 6). Respondents later filed a Motion for Sanctions in April 2023, yet did not obtain a hearing until April 2024. (Motion for Sanctions, p. 154). During that period, successor counsel for Appellant obtained the inherited litigation file, reviewed it, removed privileged materials, and tendered the

remaining contents for inspection and copying. (Letter Regarding File Production, p. 161; Circuit Court Hearing Transcript, pp. 6-7).

Respondents nevertheless refused to review the materials and communicated that they would not "take the time" to sort through them. (Email Correspondence, p. 142). They then claimed prejudice based upon delay and alleged nonproduction despite having possessed the materials and having chosen not to review them. The Probate Court imposed the harshest sanction available, issuing its Order on and the Circuit Court affirmed.

A timeline of events may best illustrate the posture and substance of the case.

July 30, 2021 - Respondents served upon Appellant certain interrogatories and requests for production of documents per the South Carolina Rules of Civil Procedure. (Email from Knox Haynsworth to John Blincow dates September 16, 2021).

November 4, 2021 – Attorney Blincow responded that Mr. Shoemaker's responses were on his desk and being sent to opposition. (Email from John Blincow to Knox Haynsworth dated November 4, 2021).

November 9, 2021 – Respondents' counsel emails Attorney Blincow acknowledging the expected discovery responses and requesting that documents be sent from "Dr. Boor". Despite Respondents have continued to claim that no such documents were produced, though all of Dr. Boor's records were produced in Respondents' discovery production. They also appear to have been provided to Respondents' counsel well before the end of 2021 (Email from Knox Haynsworth to attorney John Blincow dated November 90, 2021.)

November 19, 2021 – Appellant serve Respondents' counsel with discovery responses. (letter with discovery responses from John Blincow to Knox Haynsworth dated November

19,2021). It is noteworthy that this discovery production occurred before any Motion to Compel. No deficiency letter was ever sent, to Appellant's knowledge, prior to the filing of the Motion to Compel.[1]

December 23, 2021 – Respondents' counsel files a Motion to Compel against *pro se* Appellant (his attorney had only days before been indefinitely suspended from practice). (See Notice of Motion and Motion to Compel filed 12/3/21). Respondents did not seek the scheduling of any hearing.

April 11, 2022 – Appellant's new counsel, Mr. McKibbon, appears in the case for the first time, having been retained for purposes of appealing Appellant's Father's case, but also retained to continue in the mother's case.

January 2023 – Almost a year after Respondents filed a Motion to Compel, wherein they claimed discovery responses had not been provided, Respondents finally scheduled a hearing on their 13 month old December 2021 Motion to Compel (it was Respondent's obligation to schedule their own motion within the Probate Court).

March 10, 2023 – Judge Queen issues an Order compelling production of documents and interrogatories by March 20, 2023. (Order of Judge Queen dated 3/10/23).

March 23, 2023 – Appellant's counsel hand-delivered responsive documents to Respondent's counsel with explanation of their origin and contents (the "Supreme Court Box"). This consisted of the entire file of former counsel Blincow, which also included all previous

[1] It is important to note, however, that in December, 2021, Mr. Blincow was suspended from the practice of law and his file was immediately boxed and turned over to the South Carolina Supreme Court. From that point until the Spring of 2022, Appellant had no counsel.

document production. These documents were both responsive to document requests and to interrogatories. In fact, the documents contained a second copy of the interrogatory responses that had been provided to Respondents on November 19, 2021 (with certificate of service) despite the errant claims such documents had never been provided.[2] (Email from Appellant counsel to Respondents counsel March 23, 2023).

March 23, 2023 – the same day such documents were delivered, mere moments after such delivery, Respondents' counsel issued an email stating 'And the interrogatories?' They were in both the Supreme Court Box and had also been served upon Respondents; counsel two years prior, November 19, 2021 as evidenced by the certificate of service. Counsel then wrote and stated that Respondents' firm would not spend any time going through the single box of documents (Email from Knox Haynsworth responding to document production dated March 23, 2023).

Respondents demanded that Appellants pick up the single box of discovery. The appellant did not do so, because the production of these documents contained both responsive documents and interrogatory responses, Furthermore, Respondents' email suggested they would not 'take the time' to sort through the documents, yet Appellant can attest that a sorting through

Mr. Shoemaker had no further counsel until the middle of April 2022, whom he hired to represent him in the appeal of his father's case, a task that took extraordinary amounts of time

[2] Appellant's production of documents consisted of all documents provided by Appellant to his then attorney John Blincow, which were maintained in the ordinary course of business for approximately 5 months in a single box, not provided to Mr. Shoemaker. They were then provided to new, undersigned counsel. The March 23 production was three days late of Judge Queen's Order for production of such documents. That 3 days late was entirely due to mere inadvertence of counsel, whereas the party in interest, Mr. Shoemaker, had provided them to counsel for production in November 2021, as evidenced by John Blincow's interrogatory productions and the mere fact that the Supreme Court file contained ALL of the documents pertaining to Mary Shoemaker's estate and the dispute over that.

and effort over the ensuing months and well over a year to go through both the Circuit Court and into the Court of Appeals. It was not until after Shoemaker retained new counsel that his previous file in total was obtained, and counsel secured the file from the Supreme Court, which mailed the single banker's box of documents to Mr. Shoemaker's new counsel. Appellant's counsel is unsure of the exact date of receiving such file, but it is presumed based upon date of retainer that receipt occurred sometime in May of 2022.

During this time, the Motion to Compel filed by Respondents in December 2021 still had not been scheduled, nor requested to be scheduled by Respondents. Also, Appellant disputed the Motion and disputed any request that sanctions be ordered (as requested in the Motion to Compel), because Mr. Shoemaker believed all documents had been provided and turned over November 2021. Whether he was accurate or not, he believed he had complied with discovery requests, which is a critical point in the present Court's evaluation of whether he acted with any bad faith during this time. And in his honest belief, he was most certainly allowed to have his position be heard in a motion filed by his opponent's that he genuinely contested.

A hearing on Respondents' Motion to Compel was finally scheduled by the Respondents a full 13 months after Respondents had filed it. Respondents had made no affirmative efforts to schedule the hearing until that time. From the hearing on Respondents' Motion to Compel, Judge Queen Ordered compliance with document production and interrogatory responses by March 20, 2023. There was no warning of any kind that any noncompliance would result in the striking of pleadings. After such Order was issued on March 10, compelling responses to discovery, Mr. Shoemaker's counsel conducted a full review of the entirety of documents provided, retracted all privileged communications, and provided the documents to opposing counsel in the Supreme Court Box on March 23.

Opposing counsel then filed a motion for sanctions on April 6, 2023 seeking sanctions for Appellant's alleged failure to follow the single March 10, 2023 discovery Order, despite having received interrogatory and document responses in November 2021 and March 23, of 2023. Respondents again did not seek to schedule the motion, and again, almost an entire year passed before Respondents sought to schedule the Motion for Sanctions. The Probate Court held a hearing on sanctions almost precisely a year after the motion for sanctions was filed, on April 3, 2024 and issued an order granting sanctions of attorney's fees and the striking of Appellant's pleadings on May 17, 2024 Appellant timely appealed the Probate Court's ruling to the Circuit Court, where a hearing was held on Tuesday, November 18, 2025 An Order issued from the Circuit Court on December 15, 2025 affirming the Probate Court. This appeal followed.

STANDARD OF REVIEW

The imposition of sanctions under Rule 37, SCRCP, is reviewed for abuse of discretion. *Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317 (Ct. App. 1987). An abuse of discretion exists where the lower court's conclusions are controlled by an error of law or are without reasonable factual support. *Id.*

Because dismissal is the most severe sanction available, South Carolina courts have repeatedly held that it should not be imposed absent bad faith, willfulness, or gross indifference to the rights of other litigants. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679 (Ct. App. 1997). The Court of Appeals may and should reverse the Circuit Court if it finds that an abuse of discretion occurred at the Probate Court level, as is present in this case. *See Karppi*, at 489 S.E.2d at 681. Further, an abuse of discretion may be found where the appellant shows that the conclusion reached by the lower court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Dunn v.*

Dunn, 298 S.C. 499, 502, 381 SE.2d 734,735(1989). Courts must also consider whether lesser sanctions would adequately address any legitimate prejudice before terminating a case. *Id.; see also Choice Hotels Int'l, Inc. v. Goodwin & Boone*, 11 F.3d 469, 471-73 (4th Cir. 1993).

The Fourth Circuit evaluates its mirrored Rule 37 similarly, but with substantial and cautionary guidance. *Wilson v. Volkswagen of America, Inc*. 561 F.2d 494, (4th Cir. 1977) states as follows:

> "Recognizing the power to grant sanctions under Rule 37 is discretionary with the [Probate] Court, it follows that the exercise of such power will only be disturbed on appeal for abuse of discretion. This does not mean, though, that an appellate court should automatically affirm such exercise of discretion. It has been said that an appellate court would be remiss in its duties if it chose only to rubber stamp such orders of lower courts. On the contrary, it is obligated to consider the full record as well as the reasons assigned by the [Probate Court] for its judgment, and to reverse the judgment below, if after such review, the appellate court has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." 561 F.2d at 505-506.

ARGUMENT

I. THE LOWER COURT ERRED IN AFFIRMING THE PROBATE COURT BECAUSE THE CIRCUIT COURT RECORD CONTAINED AFFIRMATIVE EVIDENCE OF DISCOVERY COMPLIANCE, AND THE SANCTION ORDER RESTED UPON A FACTUAL PREMISE UNSUPPORTED BY THE RECORD THAT NO DISCOVERY PRODUCTION WAS PROVIDED IN 2021 NOR 2023.

An abuse of discretion occurs when a sanction rests upon factual conclusions contradicted by the record. *Downey*, 294 S.C. at 44, 362 S.E.2d 317. Discovery sanctions must be grounded in the actual procedural history, not in an overstated characterization of events. *Karppi*, 327 S.C. at 543, 489 S.E.2d 679. Where the record itself demonstrates compliance efforts, a finding of complete noncompliance cannot stand.

The circuit court record contains a Certificate of Service dated November 29, 2021 together with written interrogatory responses. The record presented also included several

thousand documents in one banker's box, which provided all responsive answers and document production. (Certificate of Service and Interrogatory Responses, pp. 124-143). Despite this production, Respondents nevertheless filed a Motion to Compel on December 3, 2021. (Motion to Compel, p. 103). Those undisputed dates are critically important. They show that written responses existed before the Motion to Compel was filed.

At the circuit court hearing, Respondents' counsel expressly identified the pages of the circuit court record containing those November 2021 materials. (Circuit Court Hearing Transcript, pp. 20-21). Thus, the existence of the responses was acknowledged. Once those responses are recognized, the dispute cannot fairly be described as one of total silence or absolute refusal to participate in discovery.

At most, the controversy becomes one concerning adequacy, organization, supplementation, or factual disagreement over what was received. Those are materially different circumstances from complete noncompliance and certainly not overt acts of attempting to prevent documents from reaching the opposing party, or destruction or concealing of evidence. Courts do not impose the litigation death penalty (striking of pleadings) merely because discovery was imperfect or because counsel dispute the sufficiency of responses.
The lower court therefore erred in affirming the Probate Court because the sanction order rested upon a materially inaccurate factual premise.

II. THE LOWER COURT ERRED IN AFFIRMING THE PROBATE COURT BECAUSE THE STRIKING OF PLEADINGS REQUIRES FAR MORE EGREGIOUS MISCONDUCT THAN THE FACTS PRESENT HERE.

South Carolina law reserves dismissal for cases involving bad faith, willfulness, or gross indifference. *Karppi*, 327 S.C. at 543, 489 S.E.2d 679. Federal courts similarly hold that dismissal is reserved for the most flagrant cases in which lesser sanctions would not suffice.

Hathcock, 53 F.3d at 40. The reason is obvious: dismissal forever extinguishes claims without adjudication on the merits.

The facts here bear no resemblance to cases where dismissal has been upheld. In *QZO, Inc. v. Moyer*, dismissal was affirmed where a party intentionally destroyed computer evidence after litigation commenced and after duties to preserve evidence had attached. 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). In *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, dismissal followed repeated violations of multiple discovery orders despite sanctions and clear warnings. 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999).

Those cases involved deliberate spoliation, serial defiance of court authority, or continued misconduct after escalating sanctions. Nothing comparable occurred here. There was no destruction of evidence. There was no refusal to appear for deposition. There were not repeated violations of multiple court orders after prior sanctions. There was no abandonment of discovery.

Instead, the record showed written responses in November 2021, later production of the inherited file, renewed responses in 2024, and continuing attempts to resolve the dispute. (Certificate of Service and Interrogatory Responses, pp. 124-143; Letter Regarding File Production, p. 161; Circuit Court Hearing Transcript, p. 21). Even if the production was imperfect, those facts do not remotely approach the level of misconduct present in cases affirming dismissal.

The lower court therefore erred in affirming because the sanction imposed was grossly disproportionate to the conduct at issue.

III. THE LOWER COURT ERRED IN AFFIRMING THE PROBATE COURT BECAUSE THE RECORD SHOWED GOOD-FAITH COMPLIANCE EFFORTS

OF THE APPELLANT, AND NO BAD FAITH, WILFUL NONCOMPLIANCE OR GROSS INDIFFERENCE IS PRESENT IN ANY FORM IN THE RECORD.

Dismissal requires meaningful culpability. *Karppi*, 327 S.C. at 543, 489 S.E.2d 679. Courts distinguish deliberate obstruction from confusion, disruption, or imperfect compliance. The law does not equate disorder with contempt.

The record here reflects repeated efforts to comply. Responses were served upon Respondents in November 2021. (Certificate of Service and Interrogatory Responses, pp. 124-143). Appellant later consented to compel relief on a motion to compel and waived objections except privilege. (Circuit Court Order, p. 2). Successor counsel then obtained the inherited file, removed privileged materials, and produced the remainder shortly after the Order compelling production in 2023. (Letter Regarding File Production, p. 161).

The record also demonstrates substantial disruption caused by prior counsel's suspension and file unavailability. (Circuit Court Hearing Transcript, pp. 6-7). Those facts matter because a litigant dealing with loss of counsel and reconstruction of files is not similarly situated to a party openly refusing court authority. It takes a great deal longer and greater efforts for the Appellant to educate new counsel as to a deep and convoluted factual history and it's a challenge for new counsel to get 'up to speek,' particularly while engaged in companion litigation and appeals involving Appellant's father's case. Appellant makes this point again in a plea to the Court to recognize 1) Appellant did provide discovery responses in November 2021 as evidenced by the Record on Appeal; 2) Appellant provided those same comprehensive responses again in the business order in which they were kept and provided by the Supreme Court. Indeed, as Appellant has stated several times, 100% of his responses and documents were turned over to his first attorney and then from nis attorney to opposing counsel in November 2021.

Respondents further acknowledged at hearing that additional responses were transmitted again on April 2, 2024, together with a request to "work this out." (Circuit Court Hearing Transcript, p. 21). That statement affirmatively supports Appellant. A party engaged in willful obstruction does not ordinarily continue sending responses while seeking compromise. Nor would a party willingly give up any and all discovery objections that might be made unless all of his information was transparent, as it was in this case. Thus, Appellant turned over 100% of responsive documents in his possession in response to the document requests and fully answered the interrogatories. The only conclusion that can be drawn from these facts is that Respondents had fully responsive documents and responses, in November 2021, March 2023, or both. And at no time were Respondents prejudiced as they had everything necessarere Respondents prejudiced as they had everything necessary to proceed to a merits hearing. There simply is no evidence of bad faith, wilfullness or gross indifference when Respondents received 100% of responsive documents and interrogatory responses and possessed them for over three years (one of which they refused to even look at the documents). Appellant thus concludes that the lower court erred in affirming the Probate Court because the record did not remotely establish the type of egregious culpability required for a striking of pleadings and dismissal of a case. Therefore, the lower court's affirmation of the Probate Court should be reversed.

IV. THE LOWER COURT ERRED IN AFFIRMING THE PROBATE COURT BECAUSE RESPONDENTS FAILED TO ESTABLISH PREJUDICE, AS THEY POSSESSED THE RESPONSIVE MATERIALS, CAUSED MUCH OF THE DELAY THEMSELVES, AND DECLINED TO REVIEW THE DOCUMENTS MADE AVAILABLE TO THEM.

Actual prejudice is a central consideration when dismissal is sought as a discovery sanction. *Wilson*, 561 F.2d at 503-06. South Carolina law likewise requires sanctions to be proportionate and no greater than necessary. *Karppi*, 327 S.C. at 543, 489 S.E.2d 679. Where the

complaining party possessed the requested information, failed to diligently pursue relief, or declined opportunities to mitigate alleged harm, dismissal should therefore be improper. Indeed, it is critical to evaluate the behavior of the Respondents in this case, rather than merely accept their baseless claims that they suffered major delays and prejudice due to Appellant's delays. On the contrary, any prejudice toward the Respondents, which they attempt to claim is delay, was caused by their own acts, or in this case, their failure to act.

Respondents possessed written discovery responses as of November 29, 2021. (Certificate of Service and Interrogatory Responses, pp. 124-143). Despite that fact, they filed a frivolous Motion to Compel only days later. (Motion to Compel, p. 103). To this day, Respondents have attempted to claim that they never received such responses, yet the record clearly reflects by letter, certificate of service, written responses and documents, that Respondents always had the discovery responses and simply failed to review them or failed to acknowledge them. Indeed, the same is true for when they were produced again in March 2023, where the Respondents very directly stated that they refused to look at the documents hand delivered in one banker's box, stating that they would not take the time to go through those documents and tried to then inaccurately label a single banker's box of documents as a "document dump."

That sequence of indisputable fact substantially weakens any assertion that Respondents were ever deprived of discovery, and certainly never subject to any nefarious intent, bad faith, wilfulness, or gross indifference from the Appellant. Why, after all, would a party produce documents in full, and then when claimed they were not produced, produce them again in full and assert that no other information nor documents existed that could possibly be responsive to the discovery requests. That can only be described as completely cooperation – confusion may

have existed, or perhaps miscommunication, or perhaps inadvertent mistake of the Respondents not reviewing discovery. But in no way can such honest and complete production be considered egregious discovery abuse justifying a striking of pleadings and dismissal, particularly in a case of such high monetary value and emotional importance (family estate dispute)..

Despite the fact that a motion to compel was filed in December 2021 (after receiving the discovery responses), Respondents then waited approximately thirteen months before scheduling their own Motion to Compel. (Circuit Court Hearing Transcript, p. 6). A party suffering urgent prejudice ordinarily seeks prompt intervention. Their year-long inaction demonstrates that any alleged harm was neither immediate nor irreparable and certainly flies in the face of a claim of prejudice to the Respondents. The Respondents could have scheduled their motion to compel quite promptly. They did not. As such, they should not in any way be allowed to claim 'delay' as a basis of any prejudice. Indeed, Respondents acted again in such a manner, causing their own delay while trying to blame Appellant for their own mistake in failing to schedule a hearing.

After the Motion to Compel, approximately 2 months thereafter, Appellant produced the same discovery responses that had been previously produced, complete and exhaustive. This consisted in most part to the file inherited from previous counsel because he was the counsel that collected all relevant responses and responsive documents, and he was the individual that provided those as proven by his letter and certificate of service in November 2021. (Letter Regarding File Production, p. 161; Circuit Court Hearing Transcript, p. 7).

Again, despite this very reasonable production of one banker's box, neatly organized, Respondents refused to review the materials and stated they would not "take the time" to sort through them. (Email Correspondence, p. 142). A party should not be able to decline to inspect documents physically tendered for review and then claim prejudice as if nothing had been

produced. Following their refusal to inspect and copy the produced discovery responses, Respondents then retained those materials for another extended period for another entire year, failing to review them even once for discovery compliance. In the meantime, Respondents had filed a Motion for Sanctions (again, having refused to review the discovery responses and claiming to have never received them from Appellant's previous counsel in November 2021).

Regarding the Motion for Sanctions, Respondents again proceeded as if they had absolutely no urgency or rush in being heard, as yet another entire year went by prior to Respondents scheduling a hearing, finally heard 13 months later in April 2024. (Motion for Sanctions, p. 154). Thus, Respondents had the discovery responses in 2021, yet claimed to have never received them, were then provided those responses again in 2023, yet overtly refused and declined to review them, delayed their own two motions by a total of 2 years, and then attempted to transform their self-created inactivity into proof of prejudice. Respondents literally attempted to blame the Appellant for the time delay due to Respondents failure to schedule hearings. Respondents literally attempted to claim that no discovery was produced, when the record reflects discovery responses were produced not once, but twice.

This case is therefore nothing like *QZO* or *Griffin Grading*, where prejudice arose from destroyed evidence or repeated defiance of court orders. In those cases and others where striking pleadings has been upheld, there is always crystal-clear evidence of a party being a bad actor; actively, intentionally seeking to do something wrong, intentionally breaking the rules for purposes of attempting to prevent the opposition from receiving information in their possession. Here, Respondents possessed the requested discovery responses almost the entirety of this litigation. At worst, if Respondents misplaced such production, or even if they did not receive the first production (despite the Record being explicitly to the contrary), they received it again in

March 2023 and could have proceeded from there to the merits of the case. Indeed, if Appellant were ordered yet again to produce discovery, the responses would be precisely the same answers and precisely the same documents, because Appellant does not have a single document in his possession even related to this case that was not provided to Respondent over 5 years ago.

Any assertion to the contrary is merely Respondent's counsel 'claiming' to have no discovery responses, claiming that the firm never received the documents in 2021 (despite an abundance of documents and clear communication and certificate of service from counsel producing the same), and without any proof whatsoever that the discovery wasn't provided at that time. If there had been legitimate concern, even if the Court felt the need to intervene to erase confusion or miscommunications, any shortcomings or confusion could have been cured through indexing, clarification, or targeted supplementation. If the Court found that some level of noncompliance did exist that justified some sort of sanction, then certainly any combination of the above or an award of attorney's fees would have been more than sufficient and in concert with the judicial mandate that striking of pleadings is a harsh medicine not to be administered lightly and only when lesser sanctions would not be satisfactory. Therefore, the lower court erred in affirming because Respondents failed to establish any prejudice to its rights given that they were the architects of the case's long delay and given the fact they received the discovery production not once, but twice.

V. THE LOWER COURT ERRED IN AFFIRMING THE PROBATE COURT BECAUSE LESSER SANCTIONS WERE AVAILABLE, THE SANCTION IMPOSED EXCEEDED THE NECESSITIES OF THE SITUATION, AND THE REQUIRED EXPLICIT WARNING OF SUCH SANCTION WAS NOT PROVIDED BY THE COURT IN ANY ORDER.

South Carolina law expressly provides that sanctions should not go beyond the necessities of the situation. *Karppi*, 327 S.C. at 543, 489 S.E.2d 679. Federal courts likewise

require meaningful consideration of lesser sanctions before dismissal. *Choice Hotels*, 11 F.3d at 471-73. Dismissal is intended as a last resort, not a first practical option. Numerous lesser remedies were available here. The Probate Court could have ordered indexed production, supplemental sworn responses, fee shifting, evidentiary limitations, rolling deadlines, or conditional sanctions tied to future conduct, which could have explicitly warned of the most serious sanction of default and dismissal. (Circuit Court Hearing Transcript, p. 20).

The facts of this case include the following: early production of discovery responses in 2021, renewed production in 2023, counsel disruption between 2021 and 2022, disputes over organization of the discovery, Respondents' refusal to inspect the produced responses, Respondent's claim that they never received the 2021 discovery despite any evidence supporting that claim, the absence of any special referee or judge reviewing the actual discovery produced and instead merely relying on blind assertions of noncompliance by Respondents, and years-long delay on the part of the Respondents in seeking any relief for its alleged discovery failures. These facts and circumstances called for management and clarification, not the harshest sanction available to the Court. The Probate Court's choice of sanction permanently prevented adjudication of Appellant's claims concerning the validity of estate instruments governing substantial family assets. (Circuit Court Hearing Transcript, p. 4). Clearly, such a case is important for merits resolution.

Were this a case where Appellant proverbially thumbed his nose at the rules and evaded production, refused production, raised improper objections, or otherwise took purposeful steps to impede the progression of justice, perhaps the harshest sanction would have been appropriate. But the undisputed facts show that is simply not the case. Under *Karppi*, and with reference to comparative cases showing extreme and egregious acts that justified the striking of pleadings, the

Court's determination in this case went far beyond what the circumstances required. The Circuit Court therefore erred in affirming the Probate Court because even if there were any facts to justify a sanction, there certainly are no established and conclusive facts or narrative history unimpeded by rhetorical spin by the Respondents that to justify the litigation death penalty, and narrower and available remedies/sanctions should have been imposed, if any.

Furthermore, nowhere in the Record did the Probate Court warn in a Court Order of the possibility or likelihood of striking of pleadings, and such warnings are required. A party "is entitled to be made aware of th[e] drastic consequence[s] of failing to meet the court's conditions at the time the conditions are imposed (in the relevant discovery Order), when he still has the opportunity to satisfy the conditions and avoid" the sanction. *Choice Hotels Int'l v. Goodwin & Boone*, 11 F.3d 469, 473 (4th Cir.1993). In the South Carolina case of *Griffin Grading Clearing, Inc. v. Tire Serv. Equip. Mfg. Co*., 334 S.C. 193, 511 S.E.2d 716 (Ct.App. 1999), the Court stated: "Four prior Orders have been issued, without meaningful compliance by the defendant. A lesser sanction of the assessment of attorney's fees was imposed [in an earlier order], yet that did not result in meaningful compliance by the defendant. In [an earlier order], the defendant received a CLEAR and explicit warning of the consequences if the defendant failed to comply with the Order of the Court, yet the defendant has done just that." *Id*. 511 S.E.2d at 719.. There has been one, and only one, discovery Order in this case. In that Order, Appellant was not warned by the Court that striking of pleadings may result as a sanction. Of course, the Respondents requested that relief in its communications with the Court, but at no time did the Court warn of such ultimate sanction in an Order; in fact, there was only one Order, and when the Court made a determination that Order was not complied with (which is disputed), the Probate Court not only issued an attorney's fees sanction of over $11,000, but ALSO struck the pleadings and dismissed the case with prejudice.

In *Choice Hotels*, *supra*, the Court stated: "when district courts choose to impose such conditions on plaintiffs and to enforce them with the "harsh sanction" of prejudicial dismissal, *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir. 1982), they must make the threat of this sanction explicit and clear so that there can be no questions, as there is in this case, as to whether a plaintiff who did not satisfy the conditions understood that, by not satisfying them, he faced prejudicial dismissal. This explicit and clear notice is demanded both by fairness to the plaintiff and by the "sound public policy of deciding cases on their merits," *Herbert v. Saffell*, 877 F.2d 267, 269 (4TH Cir. 1989), and poses not significant burden on district courts." *Choice Hotels*, at F.3d 473. Further, as noted in *Hathcock, supra*, "[T]his court has emphasized the significance of warning a defendant about the possibility of default before entering such a harsh sanction." 53 F.3d at 40. (continuing on to quote *Choice Hotels* precise language as cited above).

It is abundantly clear that a Court Order should explicitly warn a Defendant before imposing such a harsh sanction. In addition, there simply is no precedent in any South Carolina or 4th Circuit caselaw where such incredible sanctions were imposed upon a party under the exceptionally mild circumstances of the present case compared to all other cases where the striking of pleadings has been upheld. Upholding the lower court's ruling would essentially pave the way for all future Courts to strike a party's pleadings for failing to strictly abide by even a single Order of the Court, especially when there is a complete absence of explicit warning of dismissal as a sanction in a prior Order. Such consequences are completely contrary to long-established precedent at the state and federal level highly disfavoring such a sanction except in the most extreme circumstances, typically seen in destructive or evasive tactics or the absolute disregard for the Court's authority by clear and purposeful disobedience of multiple orders from the Court.

In conclusion, a warning of future dismissal as a sanction for noncompliance with an Order is required and must be explicitly stated by the Court, and such a requirement is rightly in place because of the important and powerful public policy favoring case determinations on their merits. Not only was there a complete absence of such explicit warning in the present case, but there was only one discovery order (which was essentially followed with the exception of production being 3 days late), but the evidence indisputably shows that discovery was in fact produced and responded to as early as 2021 and again in 2023 pursuant to that single discovery order. Thus, the lower court should be found to have abused its discretion, and the Circuit Court's affirmation of the Probate Court should be reversed and the case remanded to Probate Court for further proceedings.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Circuit Court, vacate the Probate Court's order striking Appellant's pleadings and dismissing the action, and remand this matter to the Probate Court for further proceedings consistent with this Court's ruling, together with such narrowly tailored lesser sanctions, if any, as justice may require.