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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton, Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC, Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., Third-Party Defendants.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **The Circuit Court Abused Its Discretion When It Struck D.R. Horton, Inc.'s Amended Answer And Third-Party Complaint And Declared It In Default for Alleged Discovery Violations Thereby Providing Respondent A Possible Multi-Million Dollar Judgment From D.R. Horton, Inc. Who Did Not Own, Rent, Lease, Operate, Control, Manage, Engage, or Utilize The Vehicle Involved In The Accident And Did Not Employ, Contract With, Have Control Over, Manage, Engage, Or Utilize The Vehicle's Driver.**

II. **The Court Abused Its Discretion By Not Considering That Respondent Served On D.R. Horton, Inc., Overbroad Discovery Demands That Far Exceeded Appropriate Discovery In This Vehicular Accident Case, Including Discovery Requests For Years Of Documents and Information Before The Driver Became A Subcontractor Of Kenneth Scott Builders, And For Years Before Kenneth Scott Builders Became The General Contractor For Horizontal Development for Cypress Ridge, And Including Documents Related To All Of Cypress Ridge, A Development Of More Than 1,400 Acres, More Than 1400 Homes, and Developed in 19 Phases Over 15 Years, Which Discovery Requests D.R. Horton, Inc. Attempted To Satisfy And Narrow.**

COUNTER FACTS

Facts Alleged in Respondent's Brief

It is often unclear what Respondent is alleging as "facts" because Respondent violated the rules of briefing by combining the statement of the case and facts into one section, and Respondent claimed that much of what is in the combined statement of the case and facts are actually "argument."[1] Respondent's amended brief continues to attempt to pass "arguments" as facts.

For example, Respondent treats its allegations in its complaint as facts; however the *complaint is not verified.* The complaint is what Respondent hopes it can prove at trial, which is not the same as facts. Likewise, Attorney's arguments and assertions in motions, memoranda, and Rule 11 letters are also not "facts." An attorney's summary and viewpoint on what he argues happened or did not happen, are not "facts."

Respondent also devoted much of its brief to cutting and pasting its prior motions, memoranda, and Rule 11 letters into its brief. Those are replete with unsupported attorney assertions and allegations while most of the underlying alleged "evidence" (emails, FOIA documents, conclusions about discovery completeness), that Respondent referenced in those

[1] That is the position Respondent took in opposition to Appellant's motion to strike Respondent's brief because Respondent tried to include alleged "facts" and record on appeal designations that were *never* provided to the circuit court. *See*, Respondent's Return in Opposition to Appellant's Motion to Strike, filed January 221, 2026; Appellants Motion to Strike filed January 5, 2026; Reply in Support of Motion to Strike, filed January 28, 2026. The court of appeals ruled in Appellant's favor and Respondent was required to resubmit the brief and designations without including material not provided to the circuit court. Order, February 25, 2026. ("Respondent shall serve and file an amended initial brief and second amended designation of matter that does not include matters not presented to the circuit court. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.""). Order filed February 25, 2026. Despite the Order, Respondent resubmitted the brief with a combined section called statement of the case and facts and still included "arguments" as facts. Respondent did not strike portions of its initial brief that Appellant identified that violated Rule 210(c), SCACR). Compare Appellant's Motion to Strike, filed January 5, 2026, with Respondent's Amended Brief.

motions, memoranda, and Rule 11 letters *was not provided* to the circuit court or the judge who issued the Orders on appeal. The court of appeals struck 19 of Respondent's designations for the record on appeal, including many emails, because they were not provided to the circuit court. Order, February 25, 2026; Appellant Motion to Strike, filed January 5, 2026.

For example, almost none of the FOIA documents that Respondent referenced were provided to the circuit court. Respondent only provided the circuit court with a few documents from the FOIA request, such as the "permit" to construct an office building at 30 Silver Lake Rd. **That permit *was not even issued until more than two months after the accident occurred*.** Permit, May 18, 2018. ROA, p. 1487. Additionally, the "permit" was to construct a building, which is vertical construction – not a land phase/horizontal construction document that the parties agreed was the subject of the discovery to be produced.

Respondent did not provide the circuit court or the judge who issued the Orders on appeal the alleged "hundreds to thousands" of documents Respondent said it received from the FOIA request. The order of magnitude between "hundreds or thousands" of documents belies any discernment as to the relevance of any of those documents or emails or whether they constituted discovery abuse by Appellant.

In contrast, Appellant submitted evidence, emails, and affidavits as to its cooperation in discovery and the parties' agreement to narrow discovery to the land phase of phase 7, which are thoroughly discussed in Appellant's Brief, Appellant's Motion for Reconsideration, Reply in Support of Appellant's Motion to Reconsider, and Opposition to Respondent's Motion to Show Cause. ROA: Appellant's Motion for Reconsideration, pp. 1355-1368 (with exhibits pp. 1369-1549); Reply in Support of Appellant's Motion to Reconsider, pp. 1942-1954 (with exhibits pp.

1955-1964); Opposition to Respondent's Motion to Show Cause, pp. 947-959 (with exhibits pp. 960-973); Imhoff Affidavit, pp. 973-979; Crawford Affidavit, pp. 899-946; O'Sako Deposition, pp. 1120-1331; Emails pp. 902-935, 943-946; Letters, pp. 936-942. Appellant also suggested and made available to Respondent a deposition of Jared O'Sako, one of Appellant's land phase employees, to assist Respondent in narrowing appropriately its discovery demands as the rules required Respondent to do.[2] Respondent took a 192-page deposition of Jared O'Sako that focused on the land phase of development, the KSB billings, and the work that KSB performed. O'Sako Deposition June 13, 2023, ROA pp. 1120-1331.

Respondent also attempts to make much of the fact that Appellant had reviewed for privilege and was prepared to provide additional emails in discovery, implying that Appellant had withheld those documents. It did not. After Respondent misrepresented the parties' agreement to narrow the discovery to phase 7 land phase documents and requested FOIA documents that encompassed multiple development phases (there are 19 in Cypress Ridge spanning 15 years, 1400 acres and over 1400 homes) and sought both land phase/horizontal *and* building phase/vertical construction documents in the FOIA request, and failed to narrow its ESL topics to be searched in emails so that topics like "dirt" which would have yielded thousands of documents itself, Appellant prepared additional emails to produce because it became clear that Respondent was trying to falsely claim Appellant was not cooperating in discovery. ROA pp. 919-921; 923; 1548-1549; 1941; Transcript p. 705 ll. 15 – p. 706 ll. 7; p. 717

[2] Respondent submitted only one affidavit that was sworn to by Attorney Ben Shelton but did not provide facts as to the issues in this appeal. Ben Shelton Affidavit. ROA pp. 895-898.

ll. 14 – p. 718 ll. 11. Appellant had already cooperated in discovery and previously provided thousands of documents.

Respondent also asserted that the injuries from the accident are devastating, life-altering permanent injuries, Resp. brief at 2. However, Respondent is driving and only sixteen (16) months after the accident was once again charged with speeding. Speeding Citation. ROA pp. 1992-1993. As a matter of judicial record, the Court may take judicial notice of this speeding ticket. Respondent speeding not long after the accident calls into question Respondent's allegations about the ongoing seriousness of the injuries, which have not yet been proven. While the Court is not deciding this question of fact in this appeal, Appellant thought the Court should have this evidence of Respondent's condition because Respondent is seeking $15 million after Appellant's answer was struck. Offer of Judgment, June 4, 2025. ROA pp. 1965-1966. Before Appellant's answer was struck the offer of judgment was for $6 million. Offer of Judgment filed October 3, 2024. ROA pp. 824-825.

The consent scheduling order agreed upon by the parties on December 13, 2024, provided for expert reports to be supplemented by Respondent by January 17, 2025, addressed other discovery deadlines, and confirmed that no trial date had yet been set and trial would not commence until summer 2025 at the earliest. ROA pp. 41-44 . The scheduling order belies Respondent's argument that it was prejudiced as to discovery that was ongoing and for which it continued to have expert reports prepared.

ARGUMENT

The Permit

Horizontal construction and Vertical construction are two highly segmented types of construction when developing a multi-home development. The distinctions between these types of construction are central to this appeal. Horizontal construction is also referred to as the land phase. Vertical construction is what is commonly referred to as the building phase. During this phase the buildings are framed, sealed, roofed, mechanicals are installed, and interior finishes are completed. Respondent knew what both horizontal construction and vertical construction were and how they were different. Respondent's Discovery Requests and Definitions ROA pp. 133-157; O'Sako Deposition June 13, 2023 Tr. pp. 13-14 at ROA p. 1133 ll. 13 – p. 1135 ll. 3.

In this case, D.R. Horton hired KSB as the sitework *general contractor* to clear, grade, and install water and sewage in the Cypress Ridge subdivision. *See* O'Sako Aff., ROA pp. 960-962; S.C. Indep. Contractor Agreement, ROA pp. 200- 206; Scope of Work, ROA pp. 214-215; Kenneth Tosky September 15, 2021 Deposition ROA p. 603 (deposition pages 26, ll. 14 - p. 27, ll. 20); KSB's Memorandum in Support of Motion for Summary Judgment, filed May 23, 2024. ROA p. 566. The dump truck owner and driver, Mr. Uriostegui and his company, was hired by KSB to work on the land phase at Cypress Ridge. ROA p. 541, 566, . Appellant was not the general contractor for any land phase horizontal construction. ROA pp. 960-962. Appellant does not serve as the general contractor for site development work and was not the general contractor for the work that was being overseen by KSB, its general contractor for site work. O'Sako Affidavit ¶¶ 8-12. ROA pp. 960-962.

No vertical construction work occurred at 30 Silver Lake Rd., Bluffton, South Carolina until after the permit was issued on May 18, 2018, more than two months after the accident occurred on March 13, 2018. Permit, May 18, 2018. ROA p. 1487. The May 18, 2018 permit is the permit Respondent led the circuit court to believe was a "smoking gun" document. However, the facts about that permit make it clear that it has no relevance to the accident, was not within the realm of discovery, and would not have been understood by Appellant that Respondent was seeking any discovery as to the vertical phase of the construction because:

1. The permit was issued **on May 18, 2018 – more than two months after the accident.**
2. When the permit was issued on May 18, 2018, Mr. Uriostegui had already ceased to perform services for KSB at least two months earlier.
3. The permit was issued to construct a building (vertical construction). The work KSB performed as the general contractor was for the land phase - horizontal construction. The work Mr. Uriostegui performed for KSB was for the land phase - horizontal construction. Appellant does not perform horizontal construction and does not have a license for that comprehensive site work. Appellant would not have reasonably believed that building construction documents were being sought or would have any bearing on the accident when the dump truck operator worked only on the land phase for which the general contractor was KSB.
4. No claim has been made that KSB or Mr. Uriostegui worked on the building at 30 Silver Lake Rd. and any such claim would necessarily be false because there was no permit to construct any building at 30 Silver Lake Rd. until May 18, 2018. The only work being performed before at least May 18, 2018 was horizontal construction for

which KSB was the general contractor. There was no permit prior to May 18, 2018 to construct a building at 30 Silver Lake Rd.

5. The discovery requests upon which the circuit court relied to find that Appellant had failed to produce the permit did not list 30 Silver Lake Rd. as an address for which permits were requested.

6. Plaintiff's' Standard Interrogatory No. 2 referred to documents that relate to the claim or defense of this case. That interrogatory would not apply to the permit issued on May 18, 2018 because it did not pertain to the land phase/horizontal construction work, and it was not issued until two months after the accident so it could have no bearing on the accident. ROA p. 1487

7. Plaintiff's General Interrogatory No. 4 asked for documents "which you have knowledge relating to this lawsuit." That interrogatory would not apply to the permit issued on May 18, 2018 because it did not pertain to the land phase/horizontal construction work, and it was not issued at the time of the accident so it could have no bearing on the accident. ROA p. 139, 135-136.

8. Plaintiff's 1st RFP No. 11 requested documents for 210 Hulston Landing Rd., Bluffton, SC 29909. ROA p. 154. Appellant would not have known the permit was includable in the discovery request because it was issued more than two months after the accident, and it was for 30 Silver Lake Rd.

9. Plaintiff's 1st RFP No. 1 asked for documents used in Appellant's answers to Plaintiff's First Set of Interrogatories. ROA p. 151. The permit would not have been used in any answer to Plaintiff's First Set of Interrogatories because it was not issued until more

than two months after the accident, it was for vertical construction work, it was not for the land phase/horizontal construction for which KSB was the general contractor and that the dump truck driver worked on.

10. Appellant would not have understood the permit would be includable in any of the discovery requests because the attorneys had agreed to limit the documents to phase 7 land phase documents because horizontal construction is what KSB and the dump truck owner worked on and for which KSB was the general contractor. ROA pp. 540-541; 564-566. The attorneys had agreed to limit the documents to phase 7 land documents as an agreed upon means of narrowing Respondent's significantly overbroad discovery requests that would otherwise have resulted in tens of thousands of documents for a development that includes over 1400 homes, over 1400 acres, developed over 15 years in 19 phases. Judge Goodstein told the parties to work out the discovery issues, and Appellant believed it had provided the discovery the parties agreed upon because Respondent did not tell Appellant it needed additional phases or any vertical construction records. ROA p. 717 ll. 14 – p. 718 ll. 11.

11. Appellant would not have understood the permit would be includable in any of the discovery requests. Moreover, Respondent admits that Appellant produced over $300,000 of billing records by KSB for land phase work at the permit location, but Respondent never asked for a permit or other vertical construction documents for that location and did not discuss expanding the scope of land phase documents beyond phase 7 land phase documents. Judge Goodstein told the parties to work out

the discovery issues, and Appellant believed it had provided the discovery the parties agreed upon because Respondent did not tell Appellant it needed additional phases or any vertical construction records. ROA 807-808; Transcript pp. 717 ll. 14 – p. 718 ll. 11

The circuit court misapprehended in its analysis that the permit to construct a building (vertical construction) at 30 Silver Lake Rd. meant that Appellant had wrongfully withheld relevant discovery. At the time of the accident KSB was contracted to be Appellant's general contractor for the land phase horizontal construction and no permit for the building phase at 30 Silver Lake Rd. was issued until two months after the accident. The circuit court then compounded that error to accuse Appellant of misstating its role in its motion for summary judgment. However, the circuit court misapprehended the difference between the land phase and the building construction phase. Appellant was not and could not have been the general contractor for the land phase. Kenneth Scott Builders was the general contractor for the site work and has a Building-BD5 license that allows it to perform horizontal site work. Board of Commercial Contractors License Information, filed June 13, 2024. ROA p. 797.; Kenneth Tosky September 15, 2021 Deposition, ROA pp. 603 (deposition p. 26, l 14 - p. 27, l 20); ROA p. 622 (deposition p. 30, ll. 24 – p. 31, ll. 15).

Additionally, Respondent's claim that it only learned about the commercial building late in the process is not factual. Kenneth Tosky told Respondent in his deposition on September 15, 2021 that:

A: So we had priced their commercial building on the Cypress Ridge, phase 7, that we were performing the horizontal, and they came back and did it themselves. I believe they had a member on staff that had a license.

Q: For vertical construction?

A; For vertical.

Tosky Deposition, September 15, 2021, ROA p. 602 (deposition p. 7 ll. 18-24). Moreover, Mr. O'Sako's deposition included Q&A about the commercial area and numerous billings from KSB to Appellant regarding that horizontal work were reviewed and discussed. O'Sako Deposition. ROA pp. 1120-1331.

Respondent was aware of the distinction between horizontal and vertical construction and even spelled it out in its interrogatories. The interrogatories have only seven (7) definitions, and one of those is for "horizontal construction." Interrogatories, filed October 14, 2024. ROA pp. 134-136. There is *no definition* in the interrogatories for vertical construction because vertical construction was not at issue in the case. ROA pp. 134-136 . There was no reason for Appellant to know that Respondent sought the vertical permit issued months after the accident.

The chart in Appellant's Initial Brief sets forth an abbreviated timeline of some of the relevant discovery communications with counsel. See Chart in Initial Brief and the emails referenced therein. ROA pp. 899 – 935; 943-946. The chart shows that Appellant was an active participant in the discovery efforts. The timeline is consistent with John Crawford's Affidavit and Exhibits and Jason Imhoff's Affidavit, as well as Appellant's Memorandum in Opposition to the Motion to Strike and Appellant's Motion to Reconsider and Reply in Support of its Motion to

Reconsider. ROA pp. 899-946; 973-979; 947-972; 1355-1549; 1942-1964. Appellant also offered to allow respondent to take an early deposition of Jared O'Sako to gain clarity as to the discovery it needed in an effort to narrow the extensive and largely irrelevant discovery Respondent had demanded of Appellant. Respondent took a 192-page deposition of O'Sako and was able to ask all the questions he had. Deposition June 13, 2023, ROA p. 1311 ll. 25-1312 ll. 2; pp. 1120-1313 Appellant cooperated in discovery and took extra steps to assist Respondent.

KSB and Mr. Uriostegui Land Phase Construction Work

D.R. Horton hired KSB as the sitework *general contractor* to clear, grade, and install water and sewage in those areas of the Cypress Ridge subdivision. *See* O'Sako Aff. ¶ 11. ROA pp. 960-962. S.C. Indep. Contractor Agreement, ROA pp. 200- 206; Scope of Work, ROA pp. 214-215. May River also separately contracted with KSB for work at its nearby property and it was from the 1223 May River Road Project that Mr. Uriostegui hauled dirt the day of the accident and not from Cypress Ridge. Uriostegui Depo. ROA pp. 1802 ll. 17 – p. 1803 ll. 8. Kenneth Tosky confirmed that Mr. Uriostegui had completed the two loads of dirt to be moved that day before the accident occurred and was not working at the time of the accident. KSB's Memorandum in Support of Motion for Summary Judgment, filed May 23, 2024. ROA p. 565-566. Mr. Uriostegui owned his own truck and was free to drive it wherever he desired after work, therefore, he was off duty that day as soon as he dumped his load for KSB before the accident. Uriostegui Depo. ROA p. 1604 ll. 7-10; KSB's Memorandum in Support of Motion for Summary Judgment, filed May 23, 2024 ROA p. 565-566.

Respondent includes references from Mr. Uriostegui's Deposition but takes them out of context and tries to pressure the deponent. On page 38 (ROA p. 1609), Mr. Uriostegui made it

clear he was not sure whether he was working after he dumped the load, stating, “I can’t recall exactly what we were supposed to do that day. It has been so long.” Uriostegui Deposition filed February 24, 2025, ROA p. 1609, ll. 17-18. And again he confirms that he cannot recall whether he had additional work after dropping the load, “At the moment I can’t recall that to be honest.” Uriostegui Deposition filed February 24, 2025, ROA p. 1612 ll. 10-11. Mr. Uriostegui did state he was returning to Cypress Ridge, that was presumably because, unbeknownst to Appellant, he liked to park his truck there, but he was unsure about whether he had additional loads that day. Mr. Tosky of KSB confirmed that Mr. Uriostegui was done for the day. KSB’s Memorandum in Support of Motion for Summary Judgment, filed May 23, 2024. ROA p. 565-566.

Judge Goodstein’s Order

Respondent argues in its Brief that Appellant cannot be heard to complain about Judge Goodstein’s Order because it was not immediately appealed. As an interlocutory order that did not result in finality in the case, and which could be cured by full compliance of the overbroad discovery requests or by working out the issues with opposing counsel, it was not necessarily immediately appealable nor is that Order itself on appeal. The Order is part of the discussion in this appeal, however, because Judge Goodstein ordered the parties to resolve discovery issues and it set the stage for the Orders on Appeal to be issued. While seeking a protective order for the overboard discovery requests would be one way to address the overbroad discovery, Appellant was concerned that doing so would be met with its Answer being struck, as the Judge stated was the next step. ROA p. 716 ll. 13-19. Accordingly, Appellant attempted to resolve the discovery disputes with Respondent, as the circuit court ordered, *and believed it had*, but

learned otherwise when Respondent filed its motion to show cause.[3] ROA. p. 717 ll. 14 – 718 l. 11. The Affidavit of John Crawford with Email Exhibits, filed October 11, 2024, shows a consistent pattern by Appellant to respond to and provide discovery. ROA pp. 899-946. Those emails also show that Respondent took a long time to even propose ESL terms and that Respondent did not ask for any additional documents after December 2023. See also, Appellant's Response and Objections to Respondent's Motion to Show Cause, filed October 16, 2024. ROA pp. 947-972. Appellant's Motion to Reconsider, filed January 27, 2025. ROA pp. 1355-1549. Appellant's Reply in Support of its Motion to Reconsider, filed March 31, 2025. ROA pp. 1942-1954. Affidavit of Jason Imhoff and Exhibit, filed October 16, 2024 shows a pattern of concerning behavior that Respondent's counsel exhibited, that Respondent had not contacted Appellant about additional discovery documents, and how Appellant struggled to get discovery from Respondent as to its experts. Affidavits also verified that the parties had negotiated what documents were to be produced. Affidavits of Jason Imhoff and John Crawford. ROA pp. 973-979; 899-946. Appellant discussed the narrowing of discovery that would be produced in its Initial Brief based on Phase 7 land phase documents and that was the scope of discovery to be produced *unless* Respondent asked for any other documents after reviewing those documents. Respondent did not ask for additional documents.

After the hearing with Judge Goodstein, Respondent's counsel sent an email on January 3, 2024, addressing discovery material Appellant provided on December 6, 2023, and stating that he would "reach out with any issues, concerns or questions regarding it separately." Email

[3] Respondent requested what would be tens of thousands of documents for an accident case. Respondent wanted an ESL search for terms like dirt, for example, and listed 105 items for a 30(b)(6) deposition in a vehicular accident case, which Respondent cancelled after the parties narrowed the initial 105 items.

from Shelton to Wooten, Jan. 3, 2024. ROA 1549. Respondent did not reach out. Instead, Respondent failed to respond to Appellant's letter, and emails, and failed to provide an agreed upon list of ESL topics to search for emails that would comply with the rules of discovery and not be overbroad. ROA pp. 911. Then after ghosting Appellant for months, Respondent filed a FOIA request without telling Appellant it required more documents.

Respondent ignored and backtracked from the agreement the parties reached to address discovery. Crawford Affidavit ¶ 8 and exhibits. ROA pp. 899-946. Over the next several months, the parties continued negotiations and Appellant updated its responses accordingly. *Id.* ¶¶ 9-11 and exhibits and the emails in Appellant's Initial Brief in its table showing continued discovery efforts. ROA pp. 899-946. On August 11, 2023 Appellant provided a breakdown of the contents of the Cypress Ridge phase 7 land development file to confirm the contents would provide what Respondent was seeking. ROA pp. 924-932. For six months, Respondent raised no further issues with needing additional documents until sending a Rule 11 letter on June 24, 2024, which Appellant promptly agreed to address. *Id.* ¶¶ 12-13 and exhibits. ROA pp. 899-901. Respondent made no further effort to consult with Appellant before filing its motion to show cause.

The FOIA Documents Were Not Provided to or Reviewed by The Circuit Court, Are Not Relevant, And Exceed the Scope of Discovery Agreed by the Party's Attorneys

Almost none of the FOIA documents were provided to the circuit court or seen by the Judge. Instead, Respondent just asserted in its Motion to Strike Appellant's Answer that all of the FOIA documents were relevant to the case while simultaneously admitting it had not even

reviewed all the documents. Motion to Strike Appellant's Answer, filed August 19, 2024, p. 8. ROA pp. 805. Respondent stated that: "Despite being unable to fully review the volume of material received from the Plaintiff's recent FOIA requests to the Town of Bluffton," which clearly affirms that Respondent could not truthfully represent to the circuit court that the documents were responsive to discovery requests or relevant to the case or not already produced by Appellant or even whether they pertained to the phase 7 land phase. *Id.* Respondent represented that the documents were hundreds if not thousands of relevant emails – but how can Respondent make such a claim without first reviewing the documents and how can such a magnitude of difference between hundreds and thousands of emails be credible? The circuit court abused its discretion when it simply accepted Respondent's unverified and unsworn assertion. Respondent's Show Cause Motion, filed August 19, 2024. ROA pp. 798-806. The FOIA documents covered more than phase 7 land phase documents.

The documents were not brought to the hearing nor were they filed with the circuit court. Appellant objected to the documents' relevancy, but the circuit court accepted Respondent's counsels' assertions without evidence or sworn testimony. This was an abuse of discretion and gave every inference to Respondent.[4] "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and *degree of prejudice*." *CFRE, LLC v. Greenville Cty.*

[4] This had been a pattern throughout the case. Respondent would file a Rule 11 letter and make assertions, generally without any evidence included with vague references to emails. Appellant attempted to overcome the unsupported allegations and filed affidavits with attached documents to show the circuit court what had been occurring; however, Respondent confused the circuit court as to the "Permit" and the distinction between horizontal and vertical construction and licenses. ROA p. 1487.

Assessor, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (emphasis added) (citation omitted). A trial court's failure to consider and weigh these factors constitutes an abuse of discretion. *Richardson ex rel. 15th Circuit Drug Enforcement Unit v. Twenty-one Thousand & No/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020). The judge did not even see the documents and ignored the distinction between vertical and horizontal construction. All the Judge was provided were a very limited number of plan documents and the May 18, 2018 permit that was issued months after the accident. ROA pp. 1487, 814-817.

Appellant argued to the Court that the permit and FOIA documents pertaining to vertical construction and other phases of construction over almost 15 years were not relevant and were not responsive to Respondent's discovery request as the parties had agreed to narrow those requests. ROA pp. 947-959; 1355-1369; 1942-1954. Both John Crawford and Jason Imhoff filed Affidavits providing sworn evidence as to these facts, while Respondent did not. ROA 899-901; 973-978.[5]

The documents referenced in the list of FOIA documents in the circuit court's Order as #2, "documents showing that plans for the site of D.R. Horton's regional office and the R/V Lot phase were one and the same" would be vertical construction plans – which were outside the scope of agreed production of documents for horizontal construction documents. Order. ROA pp. 45-55; 56-66; pp. 920; 924-932; These documents were not responsive to the narrowed

[5] Respondent states that Appellant offered over 4,000 documents in December 2024 and implies that those were documents that were previously required. They were not. Those documents were in response to the Motion to Strike that Respondent had filed because it became clear that Respondent was not honoring the discovery agreement the parties reached to narrow discovery to phase 7 land phase documents and due to Respondent not narrowing its extensive ESL terms to those that would produce tens of thousands of emails.

discovery that parties agreed to in order to overcome Respondents significantly overbroad discovery requests. These documents are irrelevant to the case, to the accident, and *were for a proposed building that did not even have a permit for construction until more than two months after the accident.* May 18, 2018 Permit. ROA p. 1487.

The documents referenced in the list of FOIA documents in the circuit court's Order as #4, "several notices of inspection and notices of violation relating to grading, surface and wastewater rules and regulations from the Town of Bluffton directed to Defendant D.R. Horton" (Appellant) *were also not provided to the circuit court and are not in the record*. Order. ROA pp. 45-55; 56-66. It is interesting that they are referred to as "directed to Defendant" as opposed to addressed to, emailed or mailed to. This is telling, because such documents would be copied to an *owner* if an owner's general contractor had issues to fix for inspection. That does not make the owner the general contractor and Respondent has not asserted that the documents in #4 identify Appellant as the general contractor. That glaring omission suggests otherwise and would be consistent with the fact that Appellant would not have received a permit to be the general contractor for the land phase because it does not hold such a license, as has been discussed previously. At most, they show Appellant as an owner, which only helps Appellant and is consistent with Appellant's position in this case. Also, what the description of #4 omits is to what phase are these documents supposed to refer? Are they from a phase from 15 years prior to the accident or the first phase of the land development phases? In any event, these documents, whatever they are, would not be relevant to the accident, would not show Appellant as the general contractor for the land phase, and there is no statement by

Respondent that it did not already receive such documents relating to phase 7 land phase from Appellant's discovery production, if any existed. Appellant produced thousands of documents.

There Was No Prejudice to Respondent

The circuit court did not find that Respondent was prejudiced by any alleged discovery issues until it added the cursory and conclusory statements in the amended order. Appellant discusses this in its Initial Brief.

Additionally, the circuit court was aware that Respondent's various expert witnesses had not completed their expert reports and had not provided the completed reports to Appellant. This precluded Appellant from completing depositions, being able to secure and complete reports for rebuttal experts, and ***clearly showed Respondent was not prepared to go to trial.*** Respondent was not prejudiced because it was not ready for trial, and had not completed its own required expert reports, had the FOIA documents for months and did not review them, and discovery remained open. The consent scheduling order dated December 13, 2024 also shows that trial was at least six months away, Respondent was required to supplement its experts reports, and discovery was still open. Consent Scheduling Order, December 13, 2024. ROA pp. 41-44. There was no prejudice shown and none that would hinder Respondent from putting on its case more than six months later.

Respondent expert deponents included Michael Fryar and Lindsay Moore as to ongoing care experts. Respondent did not need any discovery from Appellant for Respondent's medical-type and health care cost analysis experts to complete their reports, yet their reports were not completed and what they did prepare was not provided to Appellant in their then current forms

prior to the depositions. Appellant's Motion for Sanctions, ROA pp. 818-823; Depositions of Fryar and Moore. ROA pp. 988-1119.

Mr. Fryar, the vocational rehabilitation and earning capacity expert was not even retained until February 23, 2024, had never even met Mr. McGilton in person, and had only spoken with him once as of the date of his deposition in July 2024. Michael Fryar July 19, 2024 Deposition. ROA p. 1103 ll. 25 – p. 1104 ll. 3; p. 1107 ll. 22 – p. 1109 l. 1. Mr. Fryar's report was not completed because Mr. Fryar said, he did not yet have input from the doctors. Deposition ROA p. 1106 ll. 10-18; p. 1108 ll. 3 – p. 1109 l. 1. The deposition was terminated early with agreement that Appellant could continue the deposition when Mr. Fryar completed his report. Deposition ROA p. 1108 ll. 3 – p. 1109 l. 1.

Lindsay Moore, Respondent's life care planner expert, had not provided Appellant with her most recent report as of the time her deposition was being taken. Deposition August 26, 2024. ROA p. 1038 ll. 22 – p. 1042 ll. 15; p. 1028 ll. 11 – p. 1030 ll. 15; p. 1034 ll. 14-25; She testified that her report was not complete because she still needed information from Doctors Hsu and Mitchell, that she had included items in her report that the Doctors had not approved, and that she had not provided Appellant the report in its most current form. She was testifying in her deposition using an older version of the report and did not disclose this until Appellant's questioning elicited it. *Id.* at ROA p. 1038 ll. 22 – p. 1042 ll. 15; p. 1028 ll. 11 – p. 1030 ll. 15. The deposition had to be continued until such time as Appellant received Moore's most recent report and she completed her report.

In addition to the reasons set forth in Appellant's Brief, Respondent also was not prejudiced as to any delay in trial because Respondent had not yet completed its required

expert reports. "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and *degree of prejudice*." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (emphasis added) (citation omitted). Additionally, discovery was ongoing, depositions were scheduled, and Respondent was not ready for trial. There was no prejudice.[6]

Respondent's Discovery Requests were Overbroad and Abusive

Respondent's discovery requests were overbroad, and Respondent abused the discovery process. Respondent made no attempt to craft proper discovery requests or to tailor the requests as to date limits, development phases, or other means of narrowing requests to obtain relevant discovery. Instead, Respondent pursued scorched-earth discovery for tens of thousands of documents for anywhere from a 5 – 15-year time period for a vehicular accident case. The truck operator and KSB had only performed services at Cypress Ridge for a couple of years. Respondent proffered its extensive and largely irrelevant discovery while the country was still in in the depths of the covid pandemic, which made overbroad discovery requests even more difficult for companies who had lost employees to the pandemic or to the realities of required quarantines when ill, work from home policies, and skeleton staffs, which Appellant suffered. Appellant applied many hours and significant costs attempting to narrow the scope of the discovery requests. ROA pp. 899- 901; 973-978. Appellant asked repeatedly for reasonable ESL search terms from Respondent (Respondent offered terms like "dirt," which would pull thousands of irrelevant documents and emails). ROA pp. 911; 907-908; 903-904. Appellant

[6] Appellant also argued other points regarding the fact that there was no prejudice to Respondent in its Initial Brief, including the fact that it had the documents for months and had not even reviewed them.

provided the agreed upon materials after the parties agreed that the phase 7 land phase documents would be reviewed by Respondent and thereafter if Respondent needed other documents, it would notify Appellant. Respondent then further abused the discovery process by secretly filing a FOIA request for documents from other phases of the development and for vertical construction materials that were not part of the scope agreed upon by the parties and using those FOIA documents to paint Appellant as deficient in its discovery responses.

The South Carolina Supreme Court has recognized that 'discovery practice' has become a cottage industry and that "discovery requests must be 'reasonably tailored' to include *only* relevant matters." *In Oncology and Hematology Associates of S.C., LLC v. South Carolina Department of Health and Environmental Control*,-- S.E.2d --, 2010 WL1756850 (May 3, 2010)(emphasis added). The Court struck a litigant's overbroad discovery requests and vacated the circuit court's order because SRHS abused the discovery process with its scorched- earth approach. The South Carolina Supreme Court reasoned:

> We have no desire to micromanage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally. While discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that "discovery practice" has become a cottage industry and the merits of a claim are being relegated to a secondary status.
>
> We find persuasive a decision of the Texas Supreme Court in a similar situation. See In re CSX Corp., 124 S.W.3d 149 (2003). The Texas Supreme Court granted a party mandamus relief from discovery requests the court determined were overly broad and irrelevant to resolution of the dispute at hand:
>
> Generally, the scope of discovery is within the trial court's discretion. However, the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.

> Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.' . . . Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters.
>
> Id. at 152 (internal citations omitted). After finding the trial court had abused its discretion by issuing an overly broad discovery order, the trial court order compelling discovery was vacated. Id. at 153.
>
> In this case, the ALC correctly identified the "central issue" in the case before it, i.e., whether the 2004-2005 South Carolina Health Plan standards applied to the relocation of SRHS's linear accelerator. SRHS contends the standards applied only to the addition, and not the relocation, of a linear accelerator. CCC contends otherwise.
>
> SRHS's discovery requests are not remotely relevant to a resolution of the issue concerning the relocation of the linear accelerator. A challenge to relocation of the linear accelerator does not entitle SRHS to the information it seeks from CCC and affiliated entities. SRHS abused the discovery process with its scorched-earth approach.
>
> We decline to rewrite and narrowly tailor SRHS's oppressive discovery requests so as to make them proper. That would reward improper conduct. Where, as here, a party abuses discovery, the proper remedy is to vacate the requests and require the party to start over. As a result, we vacate the five discovery orders before us. *Id.*

Like the discovery requests in *In Oncology and Hematology Assoc.,* Respondent has abused the discovery process with its overbroad discovery requests, with its demanding tens of thousands of documents while Appellant's motions to dismiss and change venue were pending, and then by backing out of the parties' agreement to narrow the scope of discovery without alerting Appellant that it had done so. At every stage, Respondent moved for the most severe sanction – to have Appellant's Answer struck. Respondent abused the entire discovery process.

The South Carolina Supreme Court requirement that "discovery requests must be 'reasonably tailored' to include *only* relevant matters" is an admonishment to litigants to reframe from proffering discovery requests like those Respondent served upon Appellant. Respondent's requests would have required 15 years of records and written answers for over 1400 homes and over 1400 acres of developments, including emails, house plans, land phase plans, every hammer, nail, paintbrush, equipment, insurances for all contractors and subcontractors for the vertical construction, etc. and more for a vehicular accident involving two vehicles on a single day. This is the type of scorched earth discovery that *In Oncology and Hematology Associates* prohibits. Appellant asks the Court to review the discovery requests Respondent served on Appellant and Appellant's examples of what it would take to comply with those requests in its Initial Brief. ROA pp. 133-157. Respondent's discovery should be struck.

CONCLUSION

Respondent submitted over broad discovery demands that required 15 years of records for almost every aspect of a development of more than 1400 homes, over 1400 acres, in 19 phases of 15 years of construction for a vehicular accident that occurred on a single day. To comply with the discovery as Respondent served it would have required an extraordinary number of documents and information that had nothing to do with the accident at exorbitant cost. D.R. Horton worked with Respondent to narrow the request to phase 7 land phase documents, produced the agreed upon discovery, and attempted to move the case forward. Appellant actively participated in the discovery process, which the evidence shows. To sanction D.R. Horton, particularly in such an extreme manner as to strike its pleading and determine

Appellant in default is unreasonable, improper, and an abuse of discretion.

Striking Appellant's Answer would also be manifest injustice because there is no basis to find D.R. Horton to be liable to Respondent. Accordingly, D.R. Horton respectfully submits that the Court misapprehended relevant facts and law, and requests the Court reverse the Circuit Court's January 15, 2025 and June 3, 2025 Orders.

May 26, 2026

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton, Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC, Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., Third-Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),SCACR.

May 26, 2026

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