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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.

Appellate 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,
Edward Sloan Shoemaker and Jonathan Evans Shoemaker.....Respondents

INITIAL BRIEF OF RESPONDENTS

June 3, 2026

Respectfully submitted,
**BROWN, MASSEY, EVANS,
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LLC**

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STATEMENT OF ISSUES ON APPEAL

- I. **Was Appellant’s argument that Respondents’ counsel was served with discovery responses on November 19, 2021 ever made to the lower court and therefore properly preserved for appellate review?**

- II. **Did the probate court abuse its discretion in striking Appellant’s pleadings as a sanction for Appellant’s disregard of the Court’s March 10, 2023 Order, Appellant’s failure to ever provide written responses to Requests for Production, and Appellant’s deficient responses to interrogatories which were not sent until April 2, 2024, almost three (3) full years after discovery requests were originally served on Appellant on July 30, 2021?**

STATEMENT OF THE CASE

The background of this case is protracted and complicated. Appellant originally filed a case contesting the will and trust of his father, James Marshall Shoemaker, Jr., in the Greenville County Probate Court on June 27, 2019. Petition for Formal Hearing, case no: 2018ES2301729. Appellant’s mother, Mary Hunter “Polly” Sloan Shoemaker, was named as a Respondent in that action. *Id.* However, she passed away on December 28, 2019 and Appellant filed the present action in the Greenville County Probate Court on July 24, 2020 contesting her will and trust. Summons and Petition, case no: 2020ES2300073. On January 5, 2022, then Greenville County Probate Court Judge Clayton Jennings recused himself in the entirety from the Estates of James Marshall Shoemaker, Jr. and Mary Sloan “Polly” Shoemaker. Order, case no: 2018ES2301729 (Dec. 15, 2021). On February 1, 2022, the Honorable Joshua L. Queen was appointed as special probate court judge by the Chief Justice of the South Carolina Supreme Court for all further hearings in the James Marshall Shoemaker, Jr. case and the Mary Sloan “Polly” Shoemaker case. Order of the Supreme Court of South Carolina (Feb. 1, 2022). Summary judgment in favor of the Respondents was granted in the James Marshall Shoemaker, Jr. case, which was appealed by

Appellant to the South Carolina Court of Appeals, South Carolina Supreme Court, and lastly the United States Supreme Court which recently denied certiorari.

As far as the discovery posture of the present case of Mary Sloan “Polly” Shoemaker, Respondents answered Appellant’s interrogatories and issued documents and written responses to the requests for production on January 6, 2021. On July 30, 2021, Respondents’ discovery requests were originally served on Appellant. Resp’ts First Set of Interrogs. and Resp’ts First Req. for Produc. (July 30, 2021). By the time Respondents requested discovery from Appellant, Respondents had already fully and completely responded to Appellant’s discovery requests. Nevertheless, Appellant failed to answer the discovery requests and Respondents filed a motion to compel on December 3, 2021. Mot. to Compel (Dec. 3, 2021). Thereafter, Appellant’s then counsel was suspended, and William McKibbon was retained, filing a notice of appearance on April 11, 2022. Notice of Rep. (April 11, 2022). On June 30, 2022, Respondents’ Counsel wrote a letter to William McKibbon regarding the outstanding discovery and pending motion to compel and requesting dates for depositions. Letter from Knox Haynsworth, Resp’ts Counsel, to William R. McKibbon, III, Pet’r’s Counsel (June 30, 2022).

On January 4, 2023, the Court heard arguments in both the James Marshall Shoemaker, Jr., and the Mary Sloan “Polly” Shoemaker matters. Letter from Knox Haynsworth, Resp’ts Counsel, to the Honorable Joshua L. Queen (Feb. 24, 2023). At that hearing, Mr. McKibbon informed the Court that as to the motion to compel discovery, Appellant consented to a grant of the motion with a reasonable time to respond. Order, case no: 2020ES2300073, p. 2 (May 17, 2024). Mr. McKibbon also consented to waive objections to discovery except for attorney-client privileged items. *Id.* Both parties consented to Appellant providing responses to discovery within thirty (30)

days of the date of the hearing. *Id.* On the record, the Court granted the motion to compel within thirty (30) days. *Id.*

Based on Mr. McKibbon's assurances, no Order regarding the motion to compel discovery was issued at that time. *Id.* On February 24, 2023, Respondents' Counsel notified the Court, via letter, that Appellant had failed to respond to discovery as agreed to on the record and asked the Court to strike Appellant's pleadings. *Id.* The probate court was reluctant to sanction a party without an Order in place, so rather than strike Appellant's pleadings at that time, the probate court issued an Order on March 10, 2023, ordering Appellant to comply with discovery within ten (10) days. *Id.* 2-3; Order, case no: 2020ES2300073, p. 2 (May 17, 2024).

Appellant then failed to comply with the Court's Order of March 10, 2023, and on March 22, 2023, Respondents' Counsel wrote a letter to the court renewing their request that Appellant's pleadings be stricken as a sanction. Order, case no: 2020ES2300073, p. 3 (May 17, 2024); Letter from Knox Haynsworth, Resp'ts Counsel, to the Honorable Joshua L. Queen (Mar. 22, 2023). On March 23, 2023, Appellant's Counsel turned over a large box of documents to Respondents, including a letter stating this was his entire file as received from John Blincow, the former lawyer on the case. Order, case no: 2020ES2300073, p. 3 (May 17, 2024). Appellant still did not issue answers to interrogatories or written responses to Respondents' Requests for Production. *Id.* In response to this late and large document dump, Counsel for Respondents emailed Appellant's Counsel and asked him to pick up the box. The box contained files from two different lawsuits and did nothing to comply with outstanding discovery obligations. Mot. for Sanctions (April 6, 2023). By mixing documents from two different cases, Appellant attempted to shift the burden to Respondents to comply with Appellant's discovery obligations. Mot. for Sanctions (April 6, 2023).

Respondents filed a Motion for Sanctions on April 6, 2023, and again asked the court to strike Appellant's pleadings and dismiss all pending claims of Appellant. Mot. for Sanctions (Apr. 6, 2023). In addition, Respondents asked for the costs and attorney's fees associated with this motion pursuant to S.C. Code §§ 32-1-111 and 62-7-1004. *Id.*

On April 2, 2024, one day prior to the hearing on the Motion for Sanctions, Appellant submitted interrogatory responses to Respondents but still failed to respond to the Request for Production of Documents. Letter from William McKibbin, III, Appellant's Counsel, to Jenna Hendricks McLeod, Resp'ts Counsel (Apr. 2, 2024); Pet'r's Resp. to Resp'ts' Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024, rec'd Apr. 2, 2024). Respondents argued that the evasive and incomplete answers provided by Appellant should be treated as a failure to answer under Rule 37(a)(3), SCRPC. Transcript of Mot. for Sanctions at 11:16-19, 30:24-31:6. The probate court agreed, and Appellant's pleadings were stricken and all of Appellant's claims were summarily dismissed. Order, case no: 2020ES2300073, p. 3 (May 17, 2024). Appellant was also ordered to pay attorney's fees and costs in the amount of \$11,449.67 within ten (10) days of the May 17, 2024 Order. *Id.* Appellant has failed to pay the ordered attorney's fees and has not appealed the grant of attorney's fees.

On May 23, 2024, an employee of Counsel for Appellant emailed Respondents' Counsel asking to pick up the box containing previous counsel John Blincow's entire file which was dropped off at Respondents' Counsel's office on March 23, 2023 and left there despite Respondent's Counsel's request that Counsel for Appellant pick up the document dump on the very same date it was left, March 23, 2023. (R. p. 142) At some point after reviewing the contents of the document dump, Appellant attempts for the very first time to make an argument that discovery responses were served on Respondents on November 19, 2021 based on a certificate of

service he claims were contained in said document dump. The alleged certificate of service was never filed with the circuit court or mentioned prior to Appellant’s brief to the circuit court on September 10, 2024.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (Supp. 2018). **“The hearing must be strictly on appeal and no new evidence may be presented.”** *Id.* (emphasis added). “[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them.” *In re Estate of Weeks*, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997). Respondents submit that this is an action at law and as such, the findings of the probate court and circuit court must be upheld if there is any evidence to support them.

“A trial judge’s exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion. The burden is on the party appealing from the order to demonstrate the trial court abused its discretion.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 541-43, 489 S.E.2d 679, 681-82 (Ct. App. 1997).

Under Rule 37, SCRPC, a trial judge may impose sanctions for a party’s failure to comply with the court’s order compelling discovery, including dismissal of the action. Rule 37(b)(2)(C), SCRPC. “The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Downey v. Dixon*, 294 SC 42, 44, 362 S.E.2d 317, 318 (Ct. App. 1987). “Nevertheless, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules.” *Id.* “[T]he most severe in the spectrum of sanctions provided by statute or rule must be

available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781 (1976) (dictum).

ARGUMENT

I. Appellant’s argument that Respondents’ counsel was served with discovery responses on November 19, 2021 is unsubstantiated and in any event was not raised to the lower court and therefore cannot be raised for the first time on appeal.

Appellant’s argument that Respondents’ counsel was served with discovery responses on November 19, 2021 was made for the first time to the circuit court which was sitting as an appellate court in the present case. Respondents were not, in fact, served with any discovery responses on November 19, 2021 seeing as Respondents had to file a motion to compel based on a total lack of discovery responses on December 3, 2021. Mot. to Compel (Dec. 3, 2021); Letter from Knox Haynsworth, Resp’ts Counsel, to the Honorable Joshua L. Queen (Feb. 24, 2023); Letter from Knox Haynsworth, Resp’ts Counsel, to the Honorable Joshua L. Queen (Mar. 22, 2023). Importantly, Appellant failed to assert the allegation that Respondent was served with discovery responses on November 19, 2021 (1) in response to Respondents’ counsel’s letter on June 30, 2022 stating that discovery was outstanding, (2) in response to the Respondents’ counsel’s letter to Judge Queen on July 25, 2022, (3) at the motion to compel hearing on January 4, 2023, (4) in response to Respondents’ counsel’s letter to the Court asking that Appellant’s pleadings be stricken on February 24, 2023, (5) in response to Judge Queen’s order that Appellant respond to discovery dated March 10, 2023, (6) in response to Respondents’ counsel’s letter asking that Appellant’s pleadings be struck on March 22, 2023, (7) in response to Respondents’ motion asking that Appellant’s pleadings be struck as a sanction on April 6, 2023, (8) at the hearing on the motion for

sanctions on April 3, 2024, (9) in his motion to reconsider, (10) in his statement of issues on appeal, or (11) at any other time to Respondents. Letter from Knox (June 30, 2022), Letter from Knox (July 25, 2022); Letter from Knox (Feb. 23, 2023); Order (Mar. 10, 2023); Letter from Knox (Mar. 22, 2023); Mot. for Sanctions (Apr. 6, 2023); Transcript from Hearing (Apr. 3, 2024); Mot. to Recons. (May 29, 2024); Statement of Issues on Appeal (July 26, 2024).

“It is well settled that issues not raised and ruled on by the lower court are not preserved for appellate consideration.” *Brown v. S.C. Dep’t of Health & Env’tl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002); *see also State v. Nelson*, 331 S.C. 1, 5 n.6, 501 S.E.2d 716, 718 n. 6 (1998) (“the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court.”) “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006).

Appellant’s argument that Respondents were served with discovery on November 19, 2021 was never raised to or ruled on by the trial court. Appellant attempted to raise the argument for the first time in his brief to the circuit court. Brief of Appellant at 1, 3, 5, 7, 8, 9. Appellant did not even raise this claim in his Statement of Issues on Appeal dated July 26, 2024. Statement of Issues on Appeal. Therefore, this alleged claim that Respondents were served with discovery was created at some point after the date of July 26, 2024. This issue is not preserved for appellate review and should not be considered by the Court of Appeals. Appellant seems to base this argument on an unfiled certificate of service found in the file of Appellant’s previous counsel. Had Respondents received responses as alleged by this certificate of service, Respondents would not have had to write Appellant’s Counsel on June 30, 2022, write Judge Queen on July 25, 2022, file

and argue a motion to compel on January 4, 2023, write Judge Queen on February 24, 2023, write Judge Queen again on March 22, 2023, file a motion for sanctions on April 6, 2023, or appear and argue the motion for sanctions on April 3, 2024. Additionally, Appellant failed to mention these alleged discovery responses in response to Judge Queen's order dated March 10, 2023 ordering Appellant to comply with discovery, in his statement of issues on appeal, or his motion to reconsider. Based on the fact that the first Respondents heard of this contention was in Appellant's circuit court brief, Respondents are unable to adequately respond to this claim other than to assure the Court that Respondents did not receive responses to interrogatories until April 2, 2024 (which the probate court found were evasive and incomplete and thus to be treated as a failure to answer pursuant to SCRCP 37(a)(3)). Respondents have still to this date not received written responses to their Requests for Production.

a. Appellant did not serve Respondents' counsel with discovery responses on November 19, 2021 or March 23, 2023.

As pointed out by circuit court Judge Morgan, Appellant agreed at a hearing on January 4, 2023 to provide discovery within thirty (30) days. "So is that a – does that sort of fly in the face of in November – or in 2021 – all discovery had been produced? Yet in 2023 at the hearing, parties consented that discovery did need to be provided and would be provided in – within 30 days. An then those 30 days went by, and the discovery had not been responded to." Transcript from Circ. Ct. p. 14: 6-13. "It seems to be something – somewhat inconsistent there that – that you're saying all discovery was produced, but yet at the hearing in January 2023, well, we got, you know, we'll have 30 days to produce discovery." Transcript from Circ. Ct. p. 15:25-16:4.

Respondents were not, in fact, served with any discovery responses on November 19, 2021 seeing as Respondents had to file a motion to compel based on a total lack of discovery responses on December 3, 2021. Mot. to Compel (Dec. 3, 2021). Had Respondents been served with

discovery responses they would not have had to respond to the March 23, 2023 document dump stating that we were still waiting on interrogatories and written responses to the requests for production. Email from Knox, R. p. 142. Appellant's Counsel has consistently admitted that they turned over their entire file to Respondents on March 23, 2023 and did not even retain a copy. Transcript of Mot. for Sanctions at 119:17-19. In fact, Appellant's Counsel had to pick up the box around the end of May 2024 after their case was dismissed. Email from Cason King. The document dump by Appellant did not answer interrogatories or include written responses to the Requests for Production. Transcript of Mot. for Sanctions at 6:21-22.

Appellant finally produced these alleged discovery responses for the first time in the Record on Appeal to the Circuit Court. Nevertheless, Respondents can assure the Court that we did not receive discovery responses on November 19, 2021 or March 23, 2023. This is further illustrated by the fact that Counsel for Respondents asked for interrogatory responses via email on March 23, 2023. R. p. 144. If Respondents had received the discovery responses on November 19, 2021 or on March 23, 2023, then Appellant would not have needed to send them again on April 2, 2024, just one (1) day prior to the hearing on the motion for sanctions. Letter from William McKibbin, III, Appellant's Counsel, to Jenna Hendricks McLeod, Resp'ts Counsel (Apr. 2, 2024); Pet'r's Resp. to Resp'ts' Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024). Furthermore, assuming for arguments sake that Appellant could somehow prove that Respondents were served with discovery on November 19, 2021, Appellant still failed to raise that issue at any time to the lower court and therefore it cannot be raised on appeal.

Respondents' characterization of the circuit court record containing a Certificate of Service dated November 29, 2021 together with written interrogatory responses implies that this was part of the record from probate court which is not the case. The first time this alleged Certificate of

Service and interrogatory responses were produced to opposing counsel and the court was in the Record on Appeal to the Circuit Court on November 21, 2024. Appellant Counsel's contention that "Respondents' counsel expressly identified the pages of the circuit court record containing those November 2021 materials....Thus, the existence of the responses was acknowledged" is also misleading and inaccurate. Respondents' Counsel's reference to those materials was to point out that they were not in the record on appeal from the probate court, and were never raised or ruled on by the probate court.

b. Appellant's production on March 23, 2023 did not include answers to interrogatories or written responses to the requests for production, as required by the Rules of Civil Procedure.

The probate court correctly ruled that Appellant's production on March 23, 2023 did not satisfy their discovery obligations since the document dump did not include any written answers to interrogatories or written responses to the requests for production, as required by the *South Carolina Rules of Civil Procedure*. Order, case no: 2020ES2300073, p. 2 (May 17, 2024). "Dumping the box of documents on Respondents' Counsel is far from compliance with the Petitioner's outstanding discovery obligations. Petitioner attempted to shift the responsibility of complying with his discovery requirements to Respondents. Were the Court to allow this, the Respondents would bear the burden of responding to their own requests for production." *Id.* at 5-6. In addition, the box dumped on Respondents on March 10, 2023 contained documents mixed from the files of both James Marshall Shoemaker, Jr. and Mary Sloan "Polly" Shoemaker making it virtually impossible to glean which documents were responsive to which case. *Id.* at 6.

Furthermore, if Appellant wanted to allege the March 23, 2023 production satisfied his discovery obligations, he could have raised that to either Counsel for Respondents or the probate court and failed to do so. In order to make the argument Appellant attempts to make now, Counsel

for Appellant would have had to pick up the box of documents from Respondents' Counsel, as Respondent's Counsel requested on the same day the box was dropped off, March 23, 2023.

(Email from Knox)

c. Appellant's responses to interrogatories on April 2, 2024, just one (1) day before the hearing on the motion for sanctions, were evasive and incomplete and are therefore treated as a failure to answer pursuant to South Carolina Rule of Civil Procedure 37(a)(3).

Respondents contend that the interrogatory answers are not only several years late, but also evasive and incomplete and should therefore be treated as a failure to answer under SCRCP 37(a)(3). Rule 37(a)(3), SCRCP. SCRCP Rule 37 is the rule governing sanctions for failing to make or cooperate in discovery. *Id.* Rule 37(a)(3), SCRCP explicitly states "For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer." *Id.* Appellant argued in the hearing that "an answer to an interrogatory is an answer..." but that is incorrect under SCRCP 37(a)(3). *Id.*, Transcript of Mot. for Sanctions at 12:18-20.

Appellant failed to properly answer even a single one (1) of the eighteen (18) interrogatories. Pet'r's Resp. to Resp'ts' Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024, rec'd Apr. 2, 2024). Appellant claimed to have no photographs, no documents, no expert witnesses, no fact witnesses, no recollection of any discussions with Appellant's own children, and no recollections of any discussions with Appellant's own mother, Polly Shoemaker. *Id.* Not only is Appellant claiming to have no information to support the case that he brought and must prove, but Appellant also had already brought a similar and related case challenging the will and trust of his father, James "Shoe" Shoemaker, Jr. Shoe's case was dismissed at the summary judgment stage appealed to the Court of Appeals and eventually the United States Supreme Court which denied certiorari, but it is relevant because the witnesses are the same. The wills and trusts of both Appellant's father and mother were prepared by Lesley Moore and witnessed by the same individuals, both of whom

are attorneys. Respondents answered interrogatories and gave Appellant information as to Mrs. Shoemakers' doctors and potential witnesses in this case back in January of 2021. Nevertheless, Appellant has not taken a single deposition in an effort to legitimately pursue his claims or make any effort to determine if his claims were supported.

The responses to interrogatories were received by Respondent's Counsel on April 2, 2024 at 2:45 PM, the day before the hearing on the motion to compel. Letter from William McKibbon, III, Appellant's Counsel, to Jenna Hendricks McLeod, Resp'ts Counsel (Apr. 2, 2024); Pet'r's Resp. to Resp'ts' Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024). The responses were dated March 26, 2024. *Id.* Regardless of the late date of the responses after they were requested originally on July 30, 2021 from Appellant's original counsel, a motion to compel was filed on December 3, 2021, responses were requested from Appellant's present counsel by letter on June 30, 2022, a motion to compel was heard on January 4, 2023, and the court issued an order giving Appellant ten (10) days to comply with discovery on March 10, 2023. Resp'ts First Set of Interrogs. and Resp'ts First Req. for Produc. (July 30, 2021); Mot. to Compel (Dec. 3, 2021); Letter from Knox Haynsworth, Resp'ts Counsel, to William R. McKibbon, III, Pet'r's Counsel (June 30, 2022); Order (Mar. 10, 2023). Appellant responded by dumping a box of documents on Respondents on March 23, 2023, in violation of Judge Queen's order that all discovery be completed by March 20, 2023. Order (Mar. 10, 2023). Despite the document dump, Appellant still did not provide written responses to interrogatories to Respondent until April 2, 2024 and has still to this date not provided written responses to the requests for production (or at this point any documents responsive to the requests for production since Counsel for Appellant picked up the document dump). Email from Cason King.

Therefore, the Court properly granted Respondents' Motion for Sanctions and struck Appellant's pleadings based on Appellant's failure to ever provide written responses to Requests for Production and his deficient responses to interrogatories which were not sent until April 2, 2024, almost three full years after discovery requests were originally served on Appellant on July 30, 2021.

II. The probate court properly struck Appellant's pleadings as a sanction for Appellant's failing to comply with the court's March 10, 2023 Order and for continued discovery violations.

Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes "should serve to protect the rights of discovery provided by the Rules." *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct.App.1987). Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir.1970), cert. denied sub nom., *Trefina v. U.S.*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970). As Chief Judge Sanders eloquently stated in *Downey*:

The rights of discovery provided by the Rules were not protected in any way. Neither was Ms. Downey accorded the rights of discovery provided by the Rules, nor was the sanction imposed against Mr. Dixon a meaningful deterrent to those who might fail to submit to discovery in the future. (It is perfectly obvious that few, if any, litigants would willingly submit to the discovery provided by the Rules if the alternative were simply paying \$50.). Indeed, it can be argued that the sanction imposed in the instant case tended to encourage, rather than discourage, noncompliance with the Rules. Id. at 45-46, 46 n. 2, 362 S.E.2d at 318 n. 2.

Downey v. Dixon, 294 S.C. 42, 45-46, 46 n. 2, 362 S.E.2d 317, 318 n.2 (Ct. App. 1987).

William McKibbon assured the Court that he would comply with discovery within thirty (30) days of the hearing on the motion to compel, which was held on January 4, 2023. Order at 2 (May 17, 2024). Appellant did not answer discovery within thirty (30) days and Respondents asked that his pleadings be struck and his case dismissed. Letter from Knox Haynsworth, Resp'ts

Counsel, to the Honorable Joshua L. Queen (Feb. 24, 2023). Instead, an Order was issued giving Appellant ten (10) additional days to respond. Order (Mar. 10, 2023). Appellant again did not respond within the ordered time period. Order at 3 (May 17, 2024).

- a. Although the court is not required to warn a party of the possibility of their pleadings being struck as a sanction, Appellant's Counsel admitted that they were in fact warned of the possibility of sanctions by the probate court.**

At the circuit court hearing, Appellant's counsel stated "Well, Your Honor, yes, that there was a warning sanctions could be awarded. That is true." Transcript from Circ. Ct. p. 29:7-8. Judge Morgan pointed out that "—in his order – I'm reading his order – says he was reluctant to sanction a party without an order...So there was some warning there because a request had already been made at that point. And the judge there did not award sanctions, gave the parties an opportunity, and then according to his order, there was no compliance. And so he awarded sanctions at that time." Transcript from Circ. Ct. p. 28:19-29:4.

A court is not required to warn a party of the possibility of their pleadings being struck as a sanction. The sanction of striking pleadings is explicitly provided in SCRCF Rule 37(b)(2)(c). Rule 37(b)(2)(C), SCRCF. Rule 37, SCRCF expressly grants trial court power to order judgment by default for either the violation of a court order or, upon motion, for party's failure to respond to certain discovery requests. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 718 (Ct. App. 1997). Additionally, Appellant's Counsel was well aware of this possibility based on the fact that he was copied on not one, but two, letters asking the Court to strike Appellant's pleadings and dismiss the action on February 24, 2023 and on March 22, 2023. Letter from Knox Haynsworth, Resp'ts Counsel, to the Honorable Joshua L. Queen (Feb. 24, 2023); Letter from Knox Haynsworth, Resp'ts Counsel, to the Honorable Joshua L. Queen (Mar. 22, 2023). In addition, Respondent's motion for sanctions filed April 6, 2023 stated that "Respondents

respectfully submit that the only appropriate sanction for this continued conduct is to strike Petitioner's pleadings and summarily dismiss all pending claims of Petitioner." Mot. for Sanctions. Nevertheless, Appellant still failed to answer the interrogatories or issue written responses to the requests for production. The Rules of Civil Procedure explicitly allow for the sanction of striking pleadings and dismissing the action under Rule 37(b)(2)(c). Rule 37(b)(2)(C), SCRCF.

b. As affirmed by the circuit court, the probate court properly found that Appellant acted in bad faith, willfully and with gross indifference to the rights of other litigants.

As affirmed by the probate court, the circuit court properly found that Appellant acted in bad faith, willfully and with gross indifference to the rights of others. Order at 5-7 (May 17, 2024). Circuit Court Order at 4. The fact that Appellant's interrogatory responses were almost two years late after successor counsel was retained, and even then completely evasive and incomplete demonstrates the bad faith of Appellant. *Id.* at 5. Appellant dumped a box of documents on Respondents, willfully and with gross indifference to their rights, in an attempt to shift his discovery burden onto Respondents. *Id.* at 5-6. Appellant now attempts to state that this document dump satisfied his discovery obligations and therefore discovery was completed on March 23, 2023. Appellant's contention is misleading and inaccurate. Counsel for Appellant never responded to say that answers to interrogatories were in the document dump on March 23, 2023 and now alleges that they were and therefore Appellant complied with discovery. As the probate court states in the May 17, 2024 order "[w]ere the Court to allow this, the Respondents would bear the burden of responding to their own requests for production." *Id.* Furthermore, the documents in the box were mixed from the files of both James Marshall Shoemaker, Jr. and Mary Sloan "Polly" Shoemaker making it virtually impossible to glean which documents are responsive to

which case. *Id.* at 6. Appellant knowingly ignored the Court's March 10, 2023 Order which is additional evidence of Appellant's bad faith. *Id.* at 4.

Appellant's actions have caused his mother's estate, his siblings, the Personal Representative and Trustee associated with his mother's Will and Trust great time and expense up to this point, just to attempt to force Appellant to answer discovery that he is required to answer under the Rules, in a case that Appellant brought. *Id.* at 6. The court properly considered the precise nature of the discovery and the discovery posture of the case, Appellant's disregard of the court's order, willfulness, bad faith and the degree of prejudice to Respondents and found that the appropriate sanction was to strike Appellant's pleadings and summarily dismiss all pending claims of Appellant.

The probate court found, as affirmed by the circuit court, that (1) the March 10, 2023 Court Order to comply with discovery in ten (10) days was ignored by Appellant, (2) previous sanctions have not induced Appellant to comply (including sanctions for attorneys fees against him in this case and in the companion case of James Marshall Shoemaker, Jr.) because Appellant just refuses to pay the court ordered attorneys fees, and that (3) the possibility of the sanction of dismissal is in no way a surprise to Appellant as Respondents have asked the Court to strike Appellant's pleadings and dismiss this action three (3) times. Order (May 17, 2024); Circuit Court Order. The latest request was in a motion for sanctions filed April 6, 2023, and Appellant had almost a full year between April 6, 2023, and the last hearing on April 3, 2024, to fully answer discovery and failed to do so. Mot. for Sanctions.

Appellant attempts to shift the blame for the delay caused by his failure to answer discovery for two (2) full years (at a minimum) to Respondents no less than fourteen (14) times in his brief. What Appellant ignores, however, is his own continuing duty to not only answer discovery, but to

supplement his answers from the time of service until the time of trial. Rule 26 and Rule 26(e), SCRC. Therefore, no delay that Appellant attempts to blame on Respondents relieves him of his discovery obligations. Not to mention Appellant is the party who brought the case and therefore should be pursuing it by taking depositions, filing motions, asking for status conferences and at an absolute bare minimum, responding to discovery. These alleged delays, while Appellant claims he was “patiently waiting” did nothing but give Appellant additional time to comply with his discovery obligations before having to answer for the lack of discovery in front of a judge. Nevertheless, Appellant did not serve interrogatory answers on Respondents until April 2, 2024, one day before the hearing for sanctions, and has still to this date never issued written responses to the Requests for Production. Pet’r’s Resp. to Resp’ts’ Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024, rec’d Apr. 2, 2024).

c. Appellant failed to submit any evidence to prove a lack of bad faith, willfulness, or a gross indifference to the rights of other litigants.

Appellant did not present any evidence in the form of sworn testimony or affidavits either at the April 3, 2024 hearing on sanctions or in support of the motion to reconsider. Transcript of Mot. for Sanctions; Mot. to Recons. (May 29, 2024). Appellant’s initial brief mentions indisputable evidence, but no evidence has been admitted. A movant’s failure to present and submit admissible evidence into the record sufficient to provide the court with evidentiary support for all required findings of fact is fatal to the relief requested. *Regions Bank v. Owens*, 402 S.C. 642, 648-49, 741 S.E.2d 51, 55 (Ct. App. 2013). “[S]uch evidence is usually provided through affidavits.” *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). “[T]he grounds upon which the motion were based were not supported by affidavit. There was no error in refusing to set aside the [default judgment] upon the mere statement of the defendant, contained in the notice of his motion, and unsupported by his affidavit.” *Duncan v. Duncan*, 93 SC 487,

495, 76 S.E.2d 1099, 1011 (1912). Arguments of counsel are not considered evidence. “The arguments of Husband’s counsel did not constitute competent evidence of the amount of any debt Wife may have owed Husband...In the absence of any other evidence establishing the existence or amount of the debt, we reverse the part of the order on reconsideration which reduces Wife’s award of equitable distribution...” *Jenkins v. Jenkins*, 345 S.C. 88, 105, 545 S.E.2d 88 (Ct. App. 2001). A movant who “offered neither affidavits nor other proof” and instead “relie[d] on the allegations contained in his unverified counterclaim and arguments made by his attorney during the hearing on his motion” failed to present evidence proving the facts essential to entitle him to relief. *Bowers*, 304 S.C. at 68, 403 S.E.2d at 129.

Appellant’s Brief referenced two emails from Appellant that Appellant contends were provided to the court at the motion for sanctions. These emails were not properly authenticated or entered into evidence. In fact, Appellant’s counsel even stated “I’m not – I’ve – obviously, you know, and I’m not seeking to admit anything to exhibits...” Transcript of Mot. for Sanctions at 18:14-16. Counsel for Respondents does not even have a copy of these alleged emails or recall seeing them at the hearing. Reference to and submitting these emails to the Court at the hearing does not make them admitted evidence. The need for properly admitted evidence in the form of sworn testimony or affidavits is partly to avoid this exact scenario where the other party, in this case Respondents, are unable to respond to what Appellant is calling “evidence” when Respondents have never been provided a copy and it was not even attached to Appellant’s brief or included in the Record on Appeal.

d. Any deficiencies in discovery on the part of Appellant’s Counsel are imputable to the client.

Appellant’s Counsel stated at the hearing on the motion for sanctions that any discovery deficiencies come from him and him only and should not be held against his client. Transcript of

Mot. for Sanctions at 12:12-14. Appellant's Counsel states throughout his brief that Appellant did not act in bad faith, had no part in determining the manner in which to produce discovery, and was not the architect of delay. Appellant's Br. to Circ. Ct. 6, 8, 9, 16. Appellant's Counsel contends that Appellant provided interrogatory responses to him via email on March 6, 2023, four (4) days before any Order on the Motion to Compel on March 10, 2023. *Id.* 7; Tr. of Hr'g 18:1-24. In addition to the claim being unsupported by evidence, those incomplete interrogatory responses were not provided to Respondents for over an additional full year, until April 2, 2024, and written responses to the requests for production have still never been produced. Pet'r's Resp. to Resp't Interrogs and Req. for Produc. of Docs. (dated Mar. 26, 2024, rec'd Apr. 2, 2024). Any deficiency on the part of Appellant's Counsel is imputed to Appellant. "The courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987). Respondents should not have to suffer the consequences of Appellant's repeated failure to comply with the discovery in direct disregard of the Rules of Civil Procedure and court orders.

Appellant's alleged belief that his previous Counsel provided answers to Respondents is irrelevant. The alleged fact that Appellant provided responses to his current Counsel before Judge Queen's March 10, 2023 order is also irrelevant. The only salient fact is that Respondents did not receive **any** answers to interrogatories until April 2, 2024 after an Order from the Court, writing two letters, filing a motion to compel, having a hearing on the motion to compel, filing a motion for sanctions, and receiving deficient interrogatory responses the day before the hearing on the motion for sanctions (but still no responses to the requests for production). Respondents have still not received any written responses to the Requests for Production and the interrogatory responses provided are incomplete and evasive. A cursory glance at Appellant's answers to interrogatories

will dispel any claim that Appellant was not acting in bad faith or with gross indifference to the process or the parties in his case, seeing as he did not answer a single interrogatory. Pet'r's Resp. to Resp'ts' Interrogs. and Req. for Produc. of Docs. (dated Mar. 26, 2024, rec'd Apr. 2, 2024).

e. The record certainly does not show good faith compliance efforts as alleged by Appellant.

There was no good faith compliance efforts on the part of Appellant. Appellant failed to assert the allegation that Respondent was served with discovery responses on November 19, 2021 (1) in response to Respondents' counsel's letter on June 30, 2022 stating that discovery was outstanding, (2) in response to the Respondents' counsel's letter to Judge Queen on July 25, 2022, (3) at the motion to compel hearing on January 4, 2023, (4) in response to Respondents' counsel's letter to the Court asking that Appellant's pleadings be stricken on February 24, 2023, (5) in response to Judge Queen's order that Appellant respond to discovery dated March 10, 2023, (6) in response to Respondents' counsel's letter asking that Appellant's pleadings be struck on March 22, 2023, (7) in response to Respondents' motion asking that Appellant's pleadings be struck as a sanction on April 6, 2023, (8) at the hearing on the motion for sanctions on April 3, 2024, (9) in his motion to reconsider, (10) in his statement of issues on appeal, or (11) at any other time to Respondents. Letter from Knox (June 30, 2022), Letter from Knox (July 25, 2022); Letter from Knox (Feb. 23, 2023); Order (Mar. 10, 2023); Letter from Knox (Mar. 22, 2023); Mot. for Sanctions (Apr. 6, 2023); Transcript from Hearing (Apr. 3, 2024); Mot. to Recons. (May 29, 2024); Statement of Issues on Appeal (July 26, 2024). After agreeing to completely respond to discovery requests within thirty (30) days at the hearing on January 4, 2023 and failing to do so, Counsel for Appellant did not respond to Counsel for Respondents attempts to reach him on February 15, 2021, February 21, 2021, or February 23, 2021. Letter from Knox 2/24/23.

Appellant also references his request via email to “work this out” on April 2, 2024, an email request that came in the afternoon one (1) day prior to the hearing on the motion for sanctions and three (3) years too late. Email sent by Petitioner’s Counsel on April 2, 2024. Appellant now attempts to frame the responses attached to the April 2, 2024 email as “additional responses” when in reality these were the only responses ever received by Respondents, and found to be so deficient as to constitute a failure to answer. *Id.* It is also important to note that Respondents did not and still to this day have not received any written answers to their requests for production. Further, no documents have been produced since the document dump was picked up by Appellant’s Counsel in May of 2024. Email from Cason King.

f. The Probate Court explicitly ruled that Appellant acted in Bad Faith, Willfully, and with Gross Indifference to the Rights of Other Litigants

Appellant argues that this case is nothing like *QZO* or *Griffin Grading*. While Appellant would like to distinguish his case since both cases affirm the sanction of striking pleadings, the probate court clearly found that Appellant acted in bad faith, willfully and with gross indifference to the rights of other litigants. “Here, the trial court clearly considered the appropriate factors. In its order, the trial court gave a detailed account of Griffin’s discovery requests and Tire Service’s responses to the requests. While recognizing that Tire Service would be greatly prejudiced, the court nevertheless imposed the sanction, finding Tire Service’s willful disobedience of previous orders warranted such a sanction.” *Griffin Grading and Clearing, Inc., v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 199, 511 S.E.2d 716, (Ct. App. 1999). Similarly, in the case at hand the trial court considered the appropriate factors, recognized that Appellant would be greatly prejudiced, and nevertheless imposed the sanction finding it warranted based on Appellant’s previous behavior. (Probate Court transcript sanctions hearing).

In the case of *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004), the Court of Appeals held that there was evidence in the record that Appellant intentionally violated the TRO, the trial court considered the severity of the sanction, and the sanction was warranted based on the failure to comply meaningfully with prior orders compelling discovery. The Court of Appeals held that the Court in *QZO* complied with the standards articulated in both *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) and *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999). Similarly, in the case at hand there is evidence in the record that Appellant intentionally failed to respond to discovery for a minimum of two (2) full years with Appellant's current counsel, considered the severity of the sanction and found the sanction warranted, complying with the standards articulated in both *Karppi* and *Griffing Grading*.

Appellant relies on the case of *Karppi v. Greenville Terrazzo Co. Inc. and Ogden Teck, Inc.* (hereinafter *Ogden Teck*) to support their argument that the sanction of striking Appellant's pleadings and dismissing his case is too harsh and thus an abuse of discretion. 489 S.E.2d 679, 327 S.C. 538 (Ct. App. 1997); Appellant's Br. 10-13. Appellant fails to point out why the sanction in *Ogden Teck* was overturned, and it was not because it was too harsh on the offending party (*Ogden Teck*) but rather that it was overbroad and had an unfair effect on the other, non-offending party, *Greenville Terrazzo Co. Inc.* "The need for the trial court to narrowly tailor its sanction to the offense committed by a party is never more evidence than in cases involving multiple parties." *Ogden Teck*, 489 S.E.2d at 682, 327 S.C. at 543. The court in *Ogden Teck* struck the pleadings of the offending party (*Ogden Teck*), including *Ogden Teck's* cross-claim against *Terrazzo*. *Id.* The court determined that this unfairly gave *Terrazzo* a windfall and therefore was an overbroad

sanction. *Id.* at 682, 327 S.C. at 544. Obviously this factual scenario is not applicable in this case since there are not multiple parties or an overbroad effect on a non-offending party.

Appellant attempts to paint the facts of *Ogden Teck* as much more egregious than Appellant's own conduct. However, Respondents argue that similar to *Ogden Teck*, Appellant also (1) refused to comply with original discovery requests, (2) the trial court orally ordered full compliance with discovery within 30 days, (3) Appellant still did not comply with the discovery requests, (4) an Order was issued giving Appellant an additional ten (10) days to comply on March 10, 2024, and (5) Appellant still did not comply in blatant disregard of the court's March 10, 2024 Order. Additionally, Appellant was warned of the sanction of striking the pleadings in letters on February 24, 2023 and March 22, 2023, as well as in the motion for sanctions filed on April 6, 2023. Letter from Knox Haynsworth (Feb. 24, 2023); Letter from Knox Haynsworth (Mar. 22, 2023); Mot. to Recons. (May 29, 2024).

CONCLUSION

Appellant did not indisputably provide responses and documents to opposing counsel on November 19, 2021. Respondents have still not received full answers to interrogatories or any written responses to the requests for production. Furthermore, Appellant never made the argument that Respondents' counsel was served with discovery responses on November 19, 2021, and therefore that argument is not properly preserved for appellate review.

The probate court did not abuse its discretion by striking the Appellant's pleadings as a sanction for the Appellant's continued blatant disregard for the rules of discovery and disregard of the Court's March 10, 2023 Order, when Appellant failed to ever provide written responses to Requests for Production and only produced deficient interrogatory responses on April 2, 2024,

almost three (3) full years after discovery requests were originally served on Appellant on July 30, 2021.

June 3, 2026

Respectfully submitted,
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