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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 2026-UP-128
(S.C. Ct. App. filed March 18, 2026)
Case No. 2019-CP-43-1021

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on May 13, 2026.

QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err in affirming the trial court's sanctions order where the trial court not only abused its discretion by failing to consider the effectiveness of less drastic sanctions but also erred in failing to explicitly identify in its ruling which alternate sanctions it considered and then explain why such sanctions could not remedy the situation as effectively as a default judgment?

II. Did the trial court, as summarily affirmed by the South Carolina Court of Appeals, abuse its discretion by failing to differentiate between the Petitioners and, in particular, by imposing the harshest sanction available against the Petitioner Smoak despite the clear evidence and concession by the Respondent that there was no discovery abuse or misconduct actually committed by Smoak?

III. Did the trial court, as summarily affirmed by the South Carolina Court of Appeals, abused its discretion in concluding that the production of three pages of Blue Max Trucking records on September 30, 2021 warranted the striking of the Petitioners' answers?

IV. Did the South Carolina Court of Appeals err in summarily deciding this case which imposes the harshest sanction available under the law and substantial financial exposure to the Petitioners under the purview of Rule 220(b), SCACR, thereby providing only string citations of "black letter" law and no legal analysis applying that law correctly to the critical issues presented thereby negatively impacting the due process rights of the Petitioners?

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred in Sumter County on February 9, 2017. The Respondent's decedent, Judy Haselden, was rear-ended by a tractor-trailer driven by the Petitioner Michael D. Smoak and owned by his former employer, Murray Sand Company, Inc. At the time of the accident, Smoak was acting within the course and scope of his employment when the accident occurred. Smoak was hauling a load of rip-rap from Kershaw County to Edisto Beach, where Crowder Construction Company was involved in a beach renourishment project.

Judy Haselden filed her initial complaint against the Petitioners on February 9, 2017 (R. 41-46), and she filed an amended complaint on September 3, 2020. (R. 363-368). Those pleadings allege claims for negligence and negligent hiring, training, and supervision. Liability for the collision is not disputed, but there are issues in dispute related to damages and medical causation. (R. 370). The accident itself involved minimal property damage, and there were no complaints of injury at the scene. Haselden, in fact, drove her vehicle from the scene.

Judy Haselden passed away in February 2024, and by order filed May 15, 2024, Kimberly Welch, as the Personal Representative of the Estate of Judy Haselden, was substituted as the Plaintiff. (R. 35-37).

On March 22, 2023, Haselden filed a motion for sanctions requesting that the trial court strike the Petitioners' answer and hold them in default. (R. 375-388). A hearing was held before Circuit Court Judge George M. McFaddin, Jr. on August 4, 2023. (R. 676-733). Thereafter, on February 12, 2024, Judge McFaddin issued a sanctions order granting the motion for sanctions and striking the Petitioners' answers thereby holding them in default. (R. 14-34).

The Petitioners filed a motion for reconsideration which was denied by form order filed September 8, 2024. (R. 38-40).

The Petitioners thereafter filed a timely appeal to the South Carolina Court of Appeals. On March 18, 2026, the Court of Appeals issued an unpublished opinion affirming the sanctions orders from the court below. The Petitioners then filed a petition for rehearing which was summarily denied by the Court of Appeals by its order issued May 13, 2026.

The Petitioners now seek a writ of certiorari in this Court.

ARGUMENTS

I. The Court of Appeals erred in affirming the trial court's sanctions order where the trial court not only abused its discretion by failing to consider the effectiveness of less drastic sanctions but also erred in failing to explicitly identify in its ruling which alternate sanctions it considered and then explain why such sanctions could not remedy the situation as effectively as a default judgment.

As a discovery sanction, the trial court struck the Petitioners' answers and held both Petitioners in default. The Petitioners dispute that their conduct during discovery warrants sanctions, and even if some sanction were warranted, the trial court abused its discretion in awarding the harshest sanction available. As the record demonstrates, the trial court failed to properly exercise its discretion in considering lesser and more narrowly tailored sanctions as available to address the misconduct as found. For that reason, the Petitioners seek a reversal of the trial court's sanctions order. Yet, in an unpublished opinion with no analysis of the issues and providing only a string citation of little value, the Court of Appeals summarily affirmed the imposition of the harshest sanction available under the law.

To that point, in the introductory paragraph of its unpublished opinion, the South Carolina Court of Appeals correctly describes the overarching issue on appeal -- whether the trial court "failed to properly exercise its discretion in considering lesser and more narrowly tailored sanctions to address the misconduct as found." (Slip Op. at 2). Yet, nowhere in the Court of Appeals' opinion is that issue again mentioned or analyzed or decided. There is not even a string citation devoted to this critical issue on appeal.

Importantly, in *Karppi v. Greenville Terrazzo Co.*, *Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), the Court of Appeals held that "when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless harsh medicine

that should not be administered lightly." 489 S.E.2d at 682. As our appellate courts havc also recognized, "the sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc*, 303 S.C. 152, 399 S.E.2d 439, 440 (Ct. App. 1990). Additionally, it is imperative that "the sanction should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast." *Id*.

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

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

As the Petitioners have demonstrated, and the Respondent likewise failed to refute, the trial court abused its discretion by failing to exercise its discretionary authority. To reiterate, although the trial court states that there was no lesser sanction, the court provides no findings nor any analysis to show that it considered and rejected any lesser sanction. Instead, it stated in a

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

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

As the Petitioners argued and this Court of Appeals disregarded in its unpublished opinion and again at the rehearing stage, the mandate for appropriate fact-finding by the trial court is not unusual. In other contexts where discretion is exercised, our appellate courts routinely require a showing that discretion was appropriately exercised. For example, this Court has explained that an exercise of discretion requires *proof* that the decision-maker was "faced with alternatives, actually weighed competing considerations and made a conscious choice." *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 60 (1997). Moreover, for a dismissal based on a failure to prosecute, the Court of Appeals previously adopted the federal four-prong test, and the final prong requires the trial court to consider "the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902, 904 (Ct. App. 2006).

In deciding the appropriate sanction for discovery abuse, the federal test generally requires an appellate court to examine "whether the district court explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995). *Accord*, *In re Nichols & Associates Tryon Properties, Inc.*, 36 F.3d 1093, *4 (4th Cir. 1994) (table) ("[a]lthough the court's order does state that it considered the effectiveness of less drastic sanctions, it does not identify which alternate sanctions it considered or explain why they could not remedy the situation as effectively as a default judgment. We find that such a conclusory statement does not satisfy this court's requirement that a trial court consider the effectiveness of less drastic sanctions").

The primary focus of the trial court's finding of discovery misconduct warranting the ultimate sanction of striking the Petitioners' answers is the production on September 30, 2021 of three pages of records relating to Blue Max Trucking. Those documents consist of a two-page

spreadsheet showing deliveries of rip-rap to the Crowder Construction project from January 30, 2017 through February 22, 2017, and a one-page invoice totaling $52,756.62 to Blue Max Trucking. (R. 549-551). Without supporting evidence, the trial court concluded that the "Defendants intentionally withheld the identity of a potential defendant, Blue Max Trucking, from Plaintiff until after the statute of limitations expired" on February 9, 2020. (R. 21). The trial court thus ruled: "because Defendants' discovery violations denied Plaintiff the opportunity to pursue a claim against Blue Max Trucking, this factor favors the harsh sanction of striking Defendants' answer." (R. 22).

The Petitioners dispute the production of the three pages of records relating to Blue Max Trucking constitutes discovery abuse (which is discussed in more detail below), but even so, the Petitioners explained to the trial court and the Court of Appeals that a less drastic sanction narrowly tailored to that harm was certainly available. As the Petitioners argued, if the trial court truly found that the Respondent was prejudiced because she was barred from bringing a viable claim against Blue Max Trucking, there is no prejudice to the Respondent because this is an admitted case of negligence and there is $2 million in combined primary and excess liability insurance coverage. (R. 712). That coverage is more than adequate to compensate the Respondent for her loss, even if she were to recover in excess of the $600,000 sought by an offer of judgment in August 2023. (R. 518-519). Yet, a lesser sanction would have been to hold the sanctions in abeyance until final judgment, and if a jury awards more than $2 million, then the court could examine whether there was indeed prejudice by the Respondent not being permitted to pursue some type of negligent selection of independent contractor claim against Blue Max Trucking. However, if the jury awards less than $2 million, clearly there would be no prejudice

– certainly not prejudice that warrants a "shotgun blast" consisting of the ultimate sanction of striking an answer.

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

At any rate, the trial court abused its discretion in not even considering whether it was appropriate to hold sanctions in abeyance to see whether a jury returned a verdict in excess of the existing insurance coverage. At that point, the court would know if the Respondent was truly prejudiced by her failure to join Blue Max Trucking as an additional party-defendant rather than relying on pure speculation at this point. The Court of Appeals, however, entirely disregarded this key issue and one that clearly demonstrates an abuse of discretion by the trial court. In its unpublished opinion, the Court of Appeal identifies that the issue was raised, but that is all. Regrettably, the Court of Appeals never addressed the issue in any manner.

In sum, this Court is respectfully requested to grant a writ of certiorari to fully consider and decide this critical issue at the heart of this appeal. This case will also allow this Court the opportunity to educate the bar and bench that, prior to imposing the harshest sanction available, the trial court must not only consider the effectiveness of less drastic sanctions, but it must also *explicitly* identify in its ruling which alternate sanctions it considered and explain why such sanction could not remedy the situation as effectively as a default judgment. As noted, the Respondent insists that "the circuit court was not required to list out the lesser sanctions it considered and explain why they were inadequate." *See*, Respondent's Brief, p. 31. This case will allow this Court to educate the bar and bench that that is not the applicable law.

II. The trial court, as summarily affirmed by the South Carolina Court of Appeals, abused its discretion by failing to differentiate between the Petitioners and, in particular, by imposing the harshest sanction available against the Petitioner Smoak despite the clear evidence and concession by the Respondent that there was no discovery abuse or misconduct actually committed by Smoak.

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

Yet, despite that *conceded abuse of discretion* by the trial court, the Court of Appeals ruled that "Petitioners' argument that the circuit court failed to differentiate the actions of Smoak and Murray Sand and imputed Murray Sand's conduct to Smoak is not preserved for appellate

review because Petitioners raised this argument for the first time in their Rule 59(e) … motion to alter or amend." (Slip Op. at 2). The Court of Appeals, however, was mistaken. Under these circumstances, the refusal to consider this issue on a "gotcha" preservation argument ***which has resulted in Smoak having his answer stricken for admittedly no misconduct he committed*** should be deemed a violation of his due process rights. That result violates *the very premise of fundamental fairness*.

Importantly, as our appellate courts have consistently stated, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). This Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." *Id*. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). Additionally, "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593, 595-96 (2010). *See also*, *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"); *Cone v. State*, 443 S.C. 487, 493, 905 S.E.2d 368 (2024) (holding an issue was preserved where it was "apparent from the record the trial court understood and ruled on [the] objection"); *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551 (2023) ("We are mindful

that issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue").

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

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

Furthermore, the Respondent's position in the trial court is also meritless. There is no legal basis for imputing any alleged wrongdoing by Murray Sand to Smoak, and none has been cited by the Respondent, the trial court, or the Court of Appeals. Smoak was no longer even employed by Murray Sand during the pendency of this litigation. Moreover, the fact that they are insured under the same insurance policy is absolutely immaterial and shows the extremes to which the Respondent has gone to try to justify striking Smoak's answer when, by her own admission, there is no evidence Smoak did anything wrong. Importantly, the fact that both Petitioners are represented by the same counsel makes no difference because the trial court explicitly found no evidence of any discovery-related wrongdoing by the Petitioners' counsel. Specifically, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21). Therefore, there are no misdeeds by Smoak's counsel for which he may be found responsible. In short, as the Respondent readily admits, there is no finding or evidence that Smoak committed any discovery abuses, and on that basis, it is clear that the trial court abused its discretion in striking Smoak's answer.

In sum, the issue of Smoak's discovery abuses was not "clearly unpreserved" as is required to reject an appellate issue on a preservation basis as the foregoing authority from this Court definitively states. As indicated, fundamental fairness is at stake. Smoak is being severely punished for nothing that he did, nor anything that his counsel did.[1] Smoak has received the

[1] To reiterate, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds

harshest civil sanction available; yet, *everyone agrees he did nothing wrong*. How does that not implicate basic fundamental fairness? Accordingly, the Court of Appeals erred in affirming the sanctions imposed on the Petitioner Smoak based on a preservation analysis. This Court is asked to issue a writ of certiorari to right that wrong because, as is conceded by the Respondent, there is no evidence that Smoak committed any discovery abuses, and on that basis, the trial court abused its discretion in striking Smoak's answer. This case will also afford this Court the opportunity to educate the bar and bench that discovery sanctions – particularly the harshest sanction available under the law – may not be imposed by imputing the alleged misconduct of an employer upon an employee (former or current) without violating that employee's due process rights.

III. The trial court, as summarily affirmed by the South Carolina Court of Appeals, abused its discretion in concluding that the production of three pages of Blue Max Trucking records on September 30, 2021 warranted the striking of the Petitioners' answers.

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

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that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21). Hence, Smoak cannot be sanctioned for conduct by his defense counsel because the trial court made it clear that defense counsel did nothing wrong.

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

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

Nonetheless, in an attempt to circumvent this clear roadblock to her *supposed* vicarious liability claim she was unable to timely commence, the Respondent tries to use the 2023 decision in *Ruh*, in which a claim for negligent selection of an independent contractor was first recognized

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

Finally, the Petitioners have pointed out that the Respondent, like the trial court, repeatedly makes assumptions and inferences that are not based upon any evidence in the record but rather are premised on pure speculation. In fact, such raw speculation permeates the

Respondent's arguments. The Court of Appeals neither acknowledged nor addressed any of these points in its unpublished opinion.

For instance, the Respondent argues that the trial court should be allowed to speculate that the Petitioners "withheld information about Blue Max Trucking for self-serving reasons." (R. 26). First, even the Respondent cannot show and does not even try to show that Michael Smoak withheld any information about Blue Max Trucking.[2] Again, the striking of Smoak's answer is a clear abuse of discretion. Moreover, as to Murray Sand, the Respondent writes "Murray Sand likely agreed to hold Blue Max Trucking harmless from any liability arising from Murray Sand's actions on behalf of Blue Max Trucking." *See*, Respondent's Brief, p. 14. However, by the Respondent's own admission, there is no evidence to support that premise. Notably, the Respondent filed the deposition of Michael Smoak in support of her motion, but no deposition testimony was submitted for Murray Sand. The Respondent, in fact, scheduled and cancelled the Rule 30(b)(6) deposition of Murray Sand on several occasions. Thus, the Respondent had the opportunity to obtain the sworn testimony from Murray Sand and declined to do so. Her own failure to conduct the needed depositions to establish the relief she sought with her motion for sanctions does not give her a pass on meeting her burden of proof. It certainly does not justify or allow her reliance on pure speculation.

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

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

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

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

no representations to the trial court, except what was contained in the Smoak deposition transcript. The Respondent, at least, admits she has no evidence of Smoak's involvement, but as the record reflects, she has no evidence of Murray Sand's involvement either.

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

In sum, as outlined in the Petitioners' briefs to the Court of Appeals, the trial court committed numerous errors of law that rise to the level of an abuse of discretion. For each of those reasons, and particularly the totality of the circumstances, the sanctions award should have been reversed by the Court of Appeals. Even if there were a showing of discovery abuses

committed by one or both Petitioners (despite the absence of admissible evidence as opposed to pure speculation), then clearly a less drastic and more narrowly tailored sanction which is a "rifle-shot" that addresses the specific harm would be warranted, but certainly not the striking of the Petitioners' answers. That was an abuse of discretion that should have been overturned by the Court of Appeals. This Court is respectfully requested to address the substantial legal and dispositive issues and, most critically, the due process rights of the litigants which clearly are at stake and, to date, have been trodden upon.

IV. The South Carolina Court of Appeals erred in summarily deciding this case, which imposes the harshest sanction available under the law and creates substantial financial exposure to the Petitioners, under the purview of Rule 220(b), SCACR, thereby providing only string citations of "black letter" law and no legal analysis applying that law correctly to the critical issues presented thereby negatively impacting the due process rights of the Petitioners.

The Court of Appeals issued an unpublished *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR, although the Court did not specify which provision of Rule 220(b)(1)(A)-(D) that it found applicable to the issues raised on appeal. (Slip Op. at 2). More importantly, the string citations included as the supporting authorities for the memorandum opinion are not dispositive of the issues on appeal raised by the Petitioners and fail to provide the litigants with the bases for the Court's decision to affirm the court below. Accordingly, the issuance of a memorandum opinion has not provided the Petitioners with meaningful appellate review as warranted given the nature of the case, the imposition of the harshest sanction available, the due process rights of the Petitioners (including Michael Smoak who it is conceded did nothing wrong), and the significant monetary impact of the decision.

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

In short, the Petitioners submit this is a case that should not be decided pursuant to Rule 220(b) with only string citations of "black letter" law but no legal analysis applying that law to the critical issues presented, including the due process rights of the litigants who have received the harshest civil sanction available. Thus, the Petitioners respectfully submit that a writ of certiorari is also warranted as this case provides an opportunity for this Court to issue further guidance on the types of cases where Rule 220(b)(1) may be properly invoked by the Court of Appeals.

CONCLUSION

Based on the foregoing discussion, the Petitioners Michael D. Smoak and Murray Sand Company, Inc. respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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