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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2026-001340
C/A No. 2019-CP-43-01021

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Respondent Kimberly Welch respectfully submits this Return to the Petition for Writ of Certiorari seeking review of the decision of the court of appeals in *Welch v. Smoak*, Opinion No. 2026-UP-128 (S.C. Ct. App. filed March 18, 2026), *reh'g denied* (May 13, 2026) ("Opinion").

This is an appeal from the circuit court's February 12, 2024 order striking Petitioners' answer and holding them in default. (R. p. 14-34) ("Sanctions Order"). The circuit court ordered that "harsh sanction" primarily because Petitioners "intentionally withheld the identity of a potential defendant, Blue Max Trucking, from [Respondent] until after the statute of limitations." (R. p. 21). But Petitioners' effort to conceal their relationship with Blue Max Trucking was not the only basis for the Sanctions Order. The circuit court also found that Petitioners:

- failed to comply with the court's prior orders dated August 27, 2020, and May 17, 2021 (R. p. 28);
- withheld other discoverable information—such as the existence of a $1,000,000 excess liability insurance policy—until over two years into the litigation and after an unsuccessful mediation (R. p. 18, 26-27);
- misrepresented discovery efforts, often claiming they had conducted exhaustive searches and produced all documents in their possession (R. p. 15-18, 27-28); and
- failed "to provide or supplement discovery responses in a timely fashion" and "repeatedly provided dilatory and incomplete discovery responses" (R. p. 15-17, 21, 32).

After identifying the relevant conduct, the circuit court performed the proper analysis. The circuit court chose to strike Petitioners' answer after carefully considering the discovery posture of the case, the willful nature of the discovery abuses, and the resulting prejudice to Respondent. (R. p. 21-32); *see Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) ("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.").

On appeal, the circuit court's ruling is entitled to considerable deference. *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. Therefore, an appellate court will not interfere with a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters unless the court abuses its discretion." (internal quotations and citations omitted)). Applying the applicable standard of review, the court of appeals correctly held the circuit court "did not abuse its discretion by striking [Petitioners'] answer and holding them in default for discovery violations." Opinion at 2.

Petitioners have not demonstrated that further review by this Court is warranted. The two arguments that Petitioners lead with—that the circuit court abused its discretion by failing to consider less drastic sanctions and by striking Petitioner Smoak's answer—were never raised to the circuit court and are unpreserved. And preservation issues aside, each of Petitioners' arguments fails on the merits. In a series of recent decisions, this Court confirmed that circuit courts retain discretion to strike the pleading of a party "displaying bad faith, willful disobedience, or a callous indifference to the rights of other parties and the discovery process." *Welch v. Advance Auto Parts, Inc.*, 445 S.C. 640, 655, 916 S.E.2d 320, 328 (2025); *see also Bauknight as Tr. of James Brown 2000 Irrevocable Tr. v. Pope*, 445 S.C. 408, 422, 914 S.E.2d 848, 855 (2025); *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 30, 911 S.E.2d 406, 411 (2025). The Sanctions Order is fully consistent with both the reasoning and the holdings of those decisions, as well as the broader guidance our appellate courts have provided regarding the imposition of a sanction tantamount to default. Respondent respectfully requests that the Petition be denied.

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on February 9, 2017. Judy Haselden, the Respondent's decedent, was rear-ended by a tractor-trailer driven by Petitioner Michael Smoak and owned by Petitioner Murray Sand Co., Inc. Smoak was acting in the course and scope of his employment with Murray Sand at the time of the accident. (R. p. 369). Specifically, Smoak was hauling riprap from Kershaw to Edisto Beach, where Crowder Construction Co. was involved in a beach renourishment project.

Because this is an appeal from the circuit court's order imposing the harsh discovery sanction of striking Petitioners' answer, the discovery background in the case below is crucial. Ms. Haselden filed her complaint against Smoak and Murray Sand on May 21, 2019, and immediately served her first interrogatories and requests for production. Murray Sand filed its answer on July 25, 2019, and Smoak filed his answer on August 26, 2019.[1] Neither Murray Sand nor Smoak timely responded to Ms. Haselden's discovery requests, so she filed her first motion to compel on November 5, 2019.

On January 23, 2020, approximately 8 months after being served with the requests, Murray Sand provided its first discovery responses and produced 552 pages of documents. (R. p. 61-81). On April 30, 2020, Smoak provided his first discovery responses but did not produce any documents. The same day, Murray Sand provided 40 additional pages of documents.

Petitioners also filed their response to Ms. Haselden's motion to compel on April 30, 2020. The response stated that Murray Sand had "spent a number of hours diligently searching for the records Plaintiff claims have been withheld, and has not, to date, discovered the documents

[1] Ms. Haselden filed an amended complaint on September 3, 2020. Petitioners filed a joint answer to the amended complaint on September 17, 2020.

Plaintiff describes in her memorandum. Murray Sand is not in possession of the documents Plaintiff seeks[.]" (R. p. 198). However, on May 18, 2020, the day before the hearing on Ms. Haselden's motion to compel, Murray Sand produced an additional 246 pages of documents. During the hearing, counsel for Murray Sand again represented that all relevant documents in Murray Sand's possession had been produced to Ms. Haselden. (R. p. 667) ("[A]s I stated and as you'll see repeatedly in our voluminous responses to these discovery requests, that I've given them everything I've got. I've had my client search and search and search again.").

The circuit court granted Ms. Haselden's motion to compel on August 27, 2020, ordering Murray Sand to produce all post-accident incident reports and post-incident drug testing. (R. p. 8). Although Smoak testified that he provided a written statement to Murray Sand and took a drug test after this accident, Petitioners have never produced these materials. (R. p. 97, line 13-p. 99, line 25; R. p. 128 lines 3-18; R. p. 170 lines 3-12).

Over the course of the next year, despite several requests from Ms. Haselden, Petitioners did not supplement their production. As of May 2021, Petitioners had produced approximately 1,000 pages of documents. On May 17, 2021, the parties entered a consent scheduling order that set a written discovery deadline of September 1, 2021, and provided the case would be subject to trial on or after November 1, 2021. (R. p. 11-13).

Despite Murray Sand's previous representations that it had produced everything in its possession, Murray Sand produced 5,110 pages of documents on September 30, 2021—over five times the total number of pages of documents Petitioners had produced over the previous two years. This production, just a month prior to the case being subject to trial, occurred after the discovery deadline, after an unsuccessful mediation, and after Ms. Haselden had filed five motions to compel in an (unsuccessful) effort to obtain all relevant documents. The September 2021 production included numerous documents that had already been produced, and, like Murray Sand's previous productions, none of the documents were Bates stamped. However, the production also included over 3,000 pages of new, previously undisclosed documents.

Indeed, over two years into the litigation, Petitioners first disclosed accident registers relating to Ms. Haselden's accident, the existence of a $1,000,000 excess liability insurance policy, and the involvement of Blue Max Trucking. Petitioners' delayed disclosure of Blue Max Trucking is particularly important. Buried amongst duplicate documents in Petitioners' September 30, 2021 production was a three-page document revealing that Murray Sand was hauling riprap for Blue Max Trucking on the date of the accident. (R. p. 501-03). The document consisted of a two-page summary of the trips Murray Sand completed for Blue Max Trucking between January 30 and February 22, 2017, as well as an invoice from Murray Sand to Blue Max Trucking in the amount of $52,756.62. (*Id.*).

Ms. Haselden immediately issued a subpoena to Blue Max Trucking requesting all contracts and other records with Murray Sand, along with any other records relating to Blue Max Trucking's involvement with the beach renourishment project at Edisto Beach. (R. p. 504-06). Blue Max responded that all "documents responsive to this subpoena have been purged in accordance with State and Federal laws and regulations or are otherwise unable to be located." (R. p. 507-08). Thus, by concealing Blue Max Trucking's involvement beyond the statute of limitations and after the document retention period expired, Petitioners prevented Ms. Haselden from pursuing a claim against Blue Max Trucking or even determining its potential liability for her accident.

On March 22, 2023, Ms. Haselden filed a motion for sanctions requesting that the circuit court strike Petitioners' answer and hold them in default. (R. p. 375-88). Petitioners did not file a memorandum opposing Ms. Haselden's motion. On August 4, 2023, the Honorable George M. McFaddin, Jr. conducted a hearing and heard arguments from the parties. On February 12, 2024, the circuit court issued its Sanctions Order. Petitioners filed a motion to reconsider on February 22, 2024, which the circuit court denied on September 8, 2024. (R. p. 520-44, 38-40).

Petitioners filed their notice of appeal on October 4, 2024. On March 18, 2026, the court of appeals issued its opinion affirming the Sanctions Order. The court of appeals denied Petitioners' Petition for Rehearing by order dated May 13, 2026.

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Karppi v. Greenville Terrazzo Co.*, *Inc*., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Id*. "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id*.

ARGUMENT

I. The circuit court exercised sufficient discretion in considering whether a sanction less drastic than striking Petitioners' answer would be adequate, and Petitioners' argument that the circuit court was required to make express findings about alternate sanctions is unpreserved and without merit.

Petitioners first argue the circuit court abused its discretion by failing to consider the effectiveness of less drastic sanctions. Pet. at 4-10. In the Sanctions Order, the circuit court expressly ruled that less drastic sanctions would not be adequate. (R. p. 32) ("Under the circumstances of this case, that prejudice cannot be remedied by any lesser sanction. . . . [T]he severe sanction of striking Defendants' answer is warranted because nothing else would be adequate."). According to Petitioners, however, that was not enough, and the circuit court was required "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." Pet. at 4. Petitioners contend that without such findings in the Sanctions Order, it is "impossible for an appellate court to do its job and determine whether discretion was actually exercised and whether any error of law occurred." Pet. at 6.

Petitioners' argument is unpreserved. Though they criticize the circuit court because the Sanctions Order does not recite a litany of alternate sanctions, Petitioners only have themselves to blame for the omission. Opposing Respondent's motion for sanctions, Petitioners never asked the circuit court to consider *any* lesser sanction.[2] They certainly did not request that the circuit court consider the alternative sanction discussed in their Petition—that the court hold the sanctions in abeyance until after final judgment and revisit it based upon the amount of the jury verdict. Pet. at 8-9. Nor did Petitioners ever urge the circuit court "to *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." Pet. at 10. Instead, each of these arguments was raised for the first time at the court of appeals; therefore, these arguments are not preserved for appellate review. *See, e.g.*, *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (explaining that a party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments").

Although Petitioners failed to present any arguments about less drastic sanctions, the circuit court exercised its discretion appropriately. The Sanctions Order reveals that the circuit court was concerned with ensuring the sanction awarded would not "go beyond the necessities of the situation." *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682. The circuit court understood that a sanction resulting in default is "harsh medicine that should not be administered lightly." (R. p. 29) (quoting *Griffin Grading & Clearing*, 334 S.C. at 198, 511 S.E.2d at 718). Ultimately, the circuit court

[2] Again, Petitioners did not submit a memorandum in opposition to Respondent's motion for sanctions. During the hearing on Respondent's motion, Petitioners argued their answer should not be stricken because they did not violate any court orders, the Blue Max Trucking documents were not responsive to any discovery request, and any discovery abuse was not the result of willfulness or bad faith. (R. p. 694-713). Petitioners never asked the circuit court to consider a lesser sanction, they took an "all or nothing" approach.

found this sanction was warranted because the prejudice to Respondent "cannot be remedied by any lesser sanction." (R. p. 32). Though Petitioners dismiss the circuit court's findings as "conclusory pronouncements" without any support, Pet. at 5, the circuit court sufficiently explained its ruling:

> [T]he severe sanction of striking Defendants' answer is warranted because nothing else would be adequate. Defendants' pattern of ignoring this Court's orders and the Rules of Civil Procedure demonstrates that a less severe sanction would not protect Plaintiff's discovery rights. In sum, the events to date leave no doubt that meaningful discovery in this case will never occur, and it is proper for the Court to strike Defendants' answer.

(R. p. 32).

Based upon Petitioners' discovery conduct—which the Sanctions Order outlined in detail (R. p. 14-19)—the circuit court ruled Respondent would never be able to conduct meaningful discovery and prepare for trial. That is precisely the type of situation where the "extreme" sanction of striking a pleading is warranted. *See Welch*, 445 S.C. at 655, 916 S.E.2d at 328 (discussing the sanction's applicability when a litigant evidences "a callous indifference to the rights of other parties and the discovery process"). Of course, the circuit court also conducted a detailed analysis of the discovery posture, willfulness, and the degree of prejudice—the factors for "determining the appropriateness of a sanction[.]" *Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. The circuit court acted squarely within its discretion in deciding to strike Petitioners' answer.[3]

[3] Petitioners go as far as claiming the circuit court "abused its discretion by failing to exercise its discretionary authority." Pet. at 5. They contend the circuit court's analysis of alternative sanctions was similar to that of the trial court in *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). Not so. *Samples* involved a ruling during trial wherein the court permitted the defendant to introduce into evidence a video tape that was produced on the eve of a trial. *Id.* at 108, 495 S.E.2d at 214. In that case, the trial judge failed to "weigh the required factors" and consider "the discovery posture of the case, willfulness, and the degree of prejudice." *Id.* at 112, 495 S.E.2d at 216. Instead, the trial judge simply denied the defendant's witness the ability to "interpret" the video. *Id.* at 108, 495 S.E.2d at 214. Here, the circuit court did not fail to weigh the required factors. It studied them in detail and concluded they supported the sanction imposed.

Finally, the Court should reject Petitioners' argument 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." Pet. at 10. Though Petitioners see this an "opportunity to educate the bar and bench," Pet. at 10, this appeal is not the vehicle to do so. Again, Petitioners never encouraged the circuit court to consider any less drastic sanctions. If the Court is going to consider adopting the rule that Petitioners endorse, it should do so in an appeal where the lower court was given the opportunity to weigh in first. *See Williamson v. S.C. Elec. & Gas Co.*, 236 S.C. 101, 107, 113 S.E.2d 345, 348 (1960) ("An appellate court exists for the correction of errors committed in a lower court, and if such court has not had the opportunity to decide the question presented, there is no error for the appellate court to correct.").

In any event, Petitioners do not cite any South Carolina authority requiring a circuit court to explicitly identify and discuss alternate sanctions prior to striking a party's pleading as a discovery sanction. Petitioners instead turn to the failure to prosecute context, where our court of appeals and several federal courts have identified "the effectiveness of sanctions less drastic than dismissal" as a factor for consideration. *See McComas v. Ross*, 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct. App. 2006). Even in that context, however, a district court's failure to articulate its consideration of lesser sanctions does not automatically amount to an abuse of discretion. *See, e.g.*, *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368 (6th Cir. 1997) ("We are loathe to require the district court to incant a litany of the available lesser sanctions. Concomitantly, we do not assume that lesser sanctions were not considered simply because their consideration is not articulated.").

Respondent respectfully submits our existing caselaw provides ample guidance to trial courts faced with a request to strike a party's pleading. "Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi*, 327 S.C. at, 543, 489 S.E.2d at 682. "[T]he court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. Finally, the sanction imposed should "not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Id.*

The circuit court faithfully followed these precedents. The Sanctions Order leaves no doubt that the court considered whether a lesser sanction would be adequate. Though Petitioners disagree with the circuit court's ruling, they do not identify any abuse of discretion.

II. The circuit court did not abuse its discretion in striking the answer jointly filed by Petitioners Smoak and Murray Sand, and Petitioners' argument to the contrary is unpreserved and without merit.

Petitioners next argue the circuit court abused its discretion by striking Smoak's answer because the circuit court did not identify any discovery abuse or misconduct by Smoak. Pet. at 10-14. This argument is clearly unpreserved. Further, considering the relationship between Smoak and Murray Sand, the circuit court did not err in striking Petitioners' jointly filed answer under the facts of this case.

In the Opinion, the court of appeals held Petitioners' argument is unpreserved because they raised it for the first time in their Rule 59(e) motion to reconsider. Opinion at 2 (quoting *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.")). The court of appeals' preservation ruling was correct. During the hearing on Respondent's motion for sanctions, Petitioners never attempted to distinguish between the discovery misconduct attributable to Smoak as opposed to Murray Sand, nor did they raise the specific argument that it would be improper for the circuit court to strike Smoak's answer. (R. p. 694-713). Accordingly, this issue was not ruled upon in the Sanctions Order. (R. p. 14-34). As the court of appeals noted, this argument was raised for the first time as the final argument in Petitioners' Rule 59(e) motion to reconsider. (R. p. 542).

For these reasons, the court of appeals did not engage in a "gotcha" game by refusing to consider Petitioners' argument. Though Petitioners cite a host of cases that counsel against the application of preservation rules when the issue is "doubtful," those precedents are inapplicable here. It is undisputed that Petitioners did not raise the argument to the circuit court prior to their motion to reconsider, and the Sanctions Order did not address the argument. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue "must have been raised to *and* ruled upon by the trial judge to be preserved for appellate review" (emphasis added)).

Further, while Petitioners seek to avoid this outcome by citing an argument made by *Respondent's counsel* during the August 4, 2023 hearing, their attempt is unsuccessful. Pet. at 12. Our preservation rules clearly dictate that an issue must have been "raised *by the appellant*" to be preserved for appellate review. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (emphasis added); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). The fact that a respondent may have discussed an issue in the trial court does not preserve the argument for the appellant's appeal. *See McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding an issue was unpreserved in a situation where the issue was "clearly addressed to the court by Respondent, but Appellant advanced no arguments on this issue to the circuit court"). Thus, the court of appeals did not err in refusing to consider Petitioners' argument on preservation grounds.

Even assuming the issue was preserved, the circuit court did not abuse its discretion in striking the answer filed by Petitioners Smoak and Murray Sand. The circuit court was faced with a unique situation that Petitioners' arguments do not meaningfully address. Namely, Smoak was acting within the course and scope of his employment for Murray Sand at the time of the accident. Murray Sand and Smoak are covered under the same liability insurance policy, and they filed a joint answer to Respondent's amended complaint. (R. p. 369-74). Since the case was initiated, Murray Sand has been responsible for the defense, including the retention of counsel for itself and Smoak. Moreover, Smoak was incarcerated throughout this litigation, and his only participation was sitting for a deposition taken at the prison. (R. p. 84). Thus, Smoak necessarily had to rely upon Murray Sand to defend the case and, relevant to this appeal, participate in discovery so that all parties could adequately prepare for trial.

Under these circumstances, Murray Sand's misconduct may be imputed to Smoak. Because of the respondeat superior relationship between Petitioners, Murray Sand effectively stands in the shoes of Smoak. *See James v. Kelly Trucking Co.*, 377 S.C. 628, 634, 661 S.E.2d 329, 332 (2008). Additionally, Murray Sand effectively acted as agent for Smoak by defending the case and handling all discovery matters while Smoak was incarcerated. *See Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) ("[A]n agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case."). Under either theory, Smoak is responsible for Murray Sand's misconduct.

Petitioners' alignment in this case is completely different than the defendants' alignment in *Karppi*. In that case, Karppi brought claims relating to his purchase of defective floor covering material. He sued Greenville Terrazzo, the retailer he purchased the material from, and Ogden Teck, the manufacturer. Ogden Teck then filed a counterclaim against Karppi, as well as a cross-claim against Greenville Terrazzo. Ultimately, after Ogden Teck failed to provide discovery requested by Karppi, the circuit court struck Ogden Teck's answer, its counterclaim, and its crossclaim. 327 S.C. at 542, 489 S.E.2d at 681.

The court of appeals reversed, concluding the circuit court "failed to properly tailor its sanction to address the specific violation committed by Odgen Teck vis-à-vis Karppi." *Id.* at 543, 489 S.E.2d at 682. Specifically, the court of appeals held that by striking Ogden Teck's cross-claim, the circuit court provided Greenville Terrazzo a "windfall"—even though there was no evidence that Ogden Teck violated Greenville Terrazzo's discovery rights. *Id.* at 543-44, 489 S.E.2d at 682. Notably, the sanction also prejudiced Greenville Terrazzo by restricting its ability to defend against Karppi's allegations. *Id.* at 544, 489 S.E.2d at 682-83 (explaining that because liability was presumed as to Ogden Teck, Greenville Terrazzo was summarily stripped of its ability to defend Karppi's claims on the ground that the materials it sold were not defective).

In sum, *Karppi* involved a unique situation where the sanction imposed against one defendant both benefitted and injured another defendant undeservedly. That is not the situation here. Respondent, who was the subject of Petitioners' discovery abuse, is the only party that receives relief from the Sanctions Order. Although the Sanctions Order adversely impacts Smoak, it only does so because Murray Sand's misconduct is imputed to him. Further, if the Court were to reverse the Sanctions Order as to Smoak, the only party that would receive a "windfall" is Murray Sand. Petitioners' counsel would be able to defend the case on behalf of Smoak, which would confer a direct benefit on Murray Sand by limiting its vicarious liability. In that situation, Murray Sand would be able to avoid the consequences of its discovery misconduct altogether. For these reasons, even assuming they are preserved, there is no need for this Court to address Petitioners' arguments about the Sanctions Order reaching Smoak.

III. The circuit court did not abuse its discretion in striking Petitioners' answer based upon the Blue Max Trucking discovery, and the circuit court correctly ruled that other discovery misconduct warranted the sanction imposed.

Next, Petitioners claim the circuit court abused its discretion in concluding that the production of the Blue Max Trucking documents warranted the striking of Petitioners' answer. Pet. at 14-20. Specifically, Petitioners argue Respondent was not prejudiced by their concealment of Blue Max Trucking because "there is no evidence to suggest that the Respondent had a viable claim against Blue Max Trucking." Pet. at 15. Petitioners also argue that the circuit court relied on speculation rather than competent evidence demonstrating Petitioners' willfulness or bad faith in concealing Blue Max Trucking. Pet. at 18. As Respondent will show, those arguments are mistaken. Moreover, Petitioners' arguments fail to account for the host of other discovery misconduct that formed the basis for the Sanctions Order.

A. The circuit court did not abuse its discretion in determining that the concealment of Blue Max Trucking resulted in substantial prejudice to Respondent.

Both the circuit court and the court of appeals concluded that Respondent was prejudiced by Petitioners' concealment of Blue Max Trucking. (R. p. 29-32); (Opinion at 3). The lower courts' finding was correct. By waiting to disclose the Blue Max Trucking document after the expiration of the statute of limitations, Petitioners prevented Respondent from pursuing a claim against Blue Max Trucking. Just as importantly, however, Petitioners also prevented Respondent from learning whether Blue Max Trucking was responsible for the accident in the first place.

As noted above, Respondent first learned that Petitioners were hauling for and being paid by Blue Max Trucking in September 2021—over two years after she first requested documents relating to the accident. Immediately after identifying the Blue Max Trucking document in Petitioners' production, Respondent sent a subpoena to Blue Max Trucking requesting all contracts and other records relating to Murray Sand around the time of the accident, as well as other records relating to Blue Max Trucking's involvement with the beach renourishment project at Edisto Beach. (R. p. 504-06). Blue Max Trucking responded that it was not in possession of the requested documents because all "documents responsive to this subpoena have been purged in accordance with State and Federal laws and regulations or are otherwise unable to be located." (R. p. 507-08).

Discussing prejudice, the circuit court determined Petitioners' decision to withhold the information relating to Blue Max Trucking "prevent[ed] [Respondent] from pursuing claims against all potentially liable parties." (R. p. 30). Specifically, the circuit court ruled Respondent could not amend her complaint to name Blue Max Trucking as a defendant because the statute of limitations had expired by September 2021. (*Id.*). More fundamentally, Respondent was unable to assess whether a claim against Blue Max Trucking would be viable. (R. p. 31-32). The circuit court rightly found that no sanction other than striking Petitioners' answer could remedy that substantial prejudice. (R. p. 32).

Petitioners' only response is to question whether Respondent had a valid claim against Blue Max Trucking. Petitioners suggest the circuit court erred in finding Respondent may have had a viable negligent selection claim because *Ruh*, this Court's decision recognizing such a claim, was not decided until 2023. *Ruh v. Metal Recycling Servs., LLC*, 439 S.C. 649, 889 S.E.2d 577 (2023); Pet. at 15. Further, Petitioners argue that because the circuit court acknowledged such a claim may not have been viable, it was improper for the court to determine that Respondent was nevertheless prejudiced by her inability to explore Blue Max Trucking's liability. Pet. at 16.

For starters, *Ruh* does not support Petitioners' argument that Respondent could not have determined a negligent selection claim existed against Blue Max Trucking prior to the expiration of the statute of limitations. Although the *Ruh* Court recognized that a principal in the independent contractor relationship can be held liable for its "own negligence in selecting the independent contractor," 439 S.C. at 652, 889 S.E.2d at 579, the Court also explained that its holding "should come as no surprise to even a casual student of the law." *Id.* at 654, 889 S.E.2d at 580. Indeed, the Court stated that its holding was supported by case law dating back over 150 years and reflected the fundamental tenet that "liability follows the tortious wrongdoer." *Id.* at 654-55, 889 S.E.2d at 580. Thus, like the plaintiff in *Ruh*, Respondent could have determined the law provided a mechanism for holding Blue Max Trucking liable prior to the Supreme Court's decision in 2023.

Petitioners' other argument—that investigation may have determined a negligent selection claim against Blue Max Trucking would not be viable—also misses the mark. Because Respondent cannot discover records relating to Blue Max Trucking's selection of Murray Sand for the Crowder Construction project, she will never know for certain whether a negligent selection claim would be viable.[4] As the circuit court recognized, "[t]he prejudice here stems from the fact

[4] To be sure, Respondent submits that such a claim would have merit based on the information available. In determining whether a principal exercised reasonable care in selecting a contractor, courts consider the competence and care exhibited by the contractor. *Ruh*, 439 S.C. at 659, 889 S.E.2d at 583 ("[A] principal's actual knowledge that a contractor has demonstrated—or failed to demonstrate—competence and carefulness in prior work will always be relevant to whether the principal breached the standard of care."). Even the limited evidence available suggests that Murray Sand did not exercise competence and care in employing drivers. Smoak testified in his deposition that he had received several speeding tickets and had been involved in other accidents. (R. p. 114-19). Smoak also had an extensive criminal history, including a guilty plea to "racing on the highway." (R. p. 146-60). And of course, Petitioners' only explanation for the missing records of a drug test Smoak testified to taking after this accident is that "Smoak misspoke because he was

that Defendants' intentional misconduct denied Plaintiff the opportunity to make that determination." (R. p. 32). Because Petitioners' discovery abuses prevented Respondent from even investigating whether Blue Max Trucking was responsible for her accident, Petitioners' arguments about the ultimate merits of a negligent selection claim are off target.

B. <u>The circuit court's willfulness finding is supported by sufficient evidence</u>.

Before a trial court may impose the severe remedy of striking a party's pleading, it must determine there is "some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682. Where there is evidence to support the lower court's finding of willfulness, that finding cannot be attacked on appeal. *See QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (affirming an order striking a party's answer where "there was evidence to support the trial court's finding that Appellant willfully violated the TRO"). Here, there is ample evidence to support the circuit court's finding that, for years of the litigation, Petitioners willfully concealed the fact that they were hauling for Blue Max Trucking at the time of the accident.

This lawsuit was filed in May 2019. As of May 2021, after Respondent filed several motions to compel, Petitioners had produced approximately 1,000 pages of documents and represented, on several occasions, they had "produced everything in [their] possession that was not privileged." (R. p. 17, 270). Although Respondent knew Petitioners were hauling riprap from the Willow Oak Quarry in Kershaw to Crowder Construction in Edisto Beach, Respondent did not know Petitioners were hauling for and being paid by Blue Max Trucking. (R. p. 64-65).

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given a post-accident drug test following a subsequent motor vehicle accident while employed at Murray Sand." (App. Br. at 9).

On September 30, 2021, a month after the discovery deadline and a month prior to the case being subject to trial, Petitioners produced over 5,000 pages of documents—five times the amount of documents that had been produced in over two years of litigation. (R. p. 17). The documents were not Bates stamped, and the production included documents that were previously produced. (*Id.*). Buried amongst duplicates, however, was the three-page document showing that Murray Sand was hauling riprap for Blue Max Trucking on the date of the accident. (R. p. 501-03). Accordingly, well over two years into the litigation, Respondent learned for the first time that Murray Sand was performing extensive work for Blue Max Trucking at the time of the accident, generating a bill for over $50,000. (*Id.*).

Contrary to Petitioners' argument, there is evidence to support the circuit court's willfulness finding. The circuit court determined the timing of Petitioners' production of the Blue Max Trucking documents was willful. (R. p. 26). Because Petitioners "waited until after the statute of limitations and document retention period provided by law had expired," Respondent could not bring a claim against Blue Max Trucking or even obtain records from Blue Max Trucking relating to the arrangement with Murray Sand or the trip in question.[5] The circuit court further found that the manner in which Petitioners produced the Blue Max Trucking document evidenced their intent to conceal information. (R. p. 26) ("The Court finds the "Document Production 1" pdf that Defendants produced on September 30, 2021, was designed to prevent Plaintiff from finding the three-page document identifying Blue Max Trucking. This pdf contained 192 new documents intermingled between 340 pages of old documents—some of which had been produced multiple

[5] As noted above, Blue Max Trucking responded to Respondent's subpoena by stating "documents responsive to this subpoena have been purged in accordance with State and Federal laws and regulations or are otherwise unable to be located." (R. p. 507-08). The Federal Motor Carrier Safety Administration sets the retention period for carriers like Blue Max Trucking. *See* 49 C.F.R. § Pt. 379, App. A; (R. p. 30 n.7).

times."). The record and the Sanctions Order make clear that it was Murray Sand—not defense counsel—who sought to conceal the Blue Max Trucking documents. (R. p. 198, 667, 21). While Petitioners may disagree with the circuit court's interpretation of this evidence, it is sufficient to support the circuit court's willfulness finding. *See QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547.

C. Petitioners do not address the other discovery misconduct forming the basis for the Sanctions Order.

Although Petitioners' concealment of Blue Max Trucking was the focus of the Sanctions Order, the circuit court also relied on several other instances of discovery misconduct in determining it was proper to strike Petitioners' answer. The circuit court found Petitioners violated discovery orders, misrepresented their efforts to participate in discovery, withheld information, and consistently failed to provide or supplement discovery responses in a timely manner.

The circuit court and the court of appeals correctly concluded that Petitioners violated the August 27, 2020 order granting Respondent's motion to compel and the May 17, 2021 scheduling order. (R. p. 28); Opinion at 3. By failing to challenge this ruling in either their petition for rehearing to the court of appeals or their petition for writ of certiorari, Petitioners have abandoned any argument to the contrary. Rule 242(d)(1), SCACR; *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005) (noting an issue that is not raised in the petition for rehearing and in the petition for writ of certiorari is unpreserved for review).

Further, Petitioners provide no explanation for their failure to produce the accident registers and information about the $1,000,0000 excess liability policy until over two years into the litigation. As the circuit court concluded, "the only logical explanation is that Defendants intentionally withheld these documents until after mediation and the discovery deadline to devalue Plaintiff's case." (R. p. 27). Nor do Petitioners attempt to justify their production of over 5,000 pages of documents "after the discovery deadline and after representing to the Court and Plaintiff on multiple occasions that they had conducted exhaustive searches and produced all documents in their possession." (R. p. 28).

More generally, the circuit court found that Petitioners' failure to participate in discovery prevented Respondent from preparing for trial. The circuit court examined Petitioners' discovery responses throughout the case and determined that they "consistently failed to provide or supplement discovery responses in a timely fashion" and "repeatedly provided dilatory and incomplete discovery responses." (R. p. 15-17, 21, 32). The circuit court correctly found Petitioners' approach to discovery prevented Respondent from learning "basic information about the accident in a timely manner," thereby preventing her from preparing for trial. (R. p. 32).

Although Petitioners wish to ignore these findings, they firmly support the circuit court's decision to strike Petitioners' answer. *See Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 911 S.E.2d 406 (2025) (affirming an order striking a party's pleadings where the party "missed discovery response deadlines; failed to fully comply with motions to compel; represented to the court they would cooperate in discovery, but then failed to follow through; and failed to pay past monetary sanctions," all of which amounted to "a deliberate pattern of discovery abuse").

IV. The court of appeals' choice to decide this appeal via a Rule 220(b) memorandum opinion does not present a basis for certiorari.

Petitioners' final argument has nothing to do with whether the circuit court abused its discretion in the Sanctions Order. Instead, Petitioners take issue with the form of the court of appeals' opinion. Specifically, they contend they have not received meaningful appellate review because the court of appeals issued a Rule 220(b) memorandum opinion. Pet. at 20-21.

Petitioners do not challenge the court of appeals' ability to issue opinions under Rule 220(b), they just claim the court of appeals should not have done so here. Ultimately, it is up to the court of appeals to decide how to write its opinions—not Petitioners or Respondent. That said, Respondent respectfully submits this case was properly decided under Rule 220(b) for two primary reasons. First, as discussed above, several of the arguments advanced on appeal were not preserved in the circuit court. Second, and more importantly, this appeal involves a highly deferential standard of review. *See Davis*, 409 S.C. at 281, 762 S.E.2d at 543 ("[A]n appellate court will not interfere with a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters unless the court abuses its discretion.").

Though they desire more, Petitioners have received adequate appellate review. The court of appeals considered the record, identified the discovery misconduct at issue, and held the circuit court did not abuse its discretion in striking Petitioners' answer under established case law. Whether that affirmance took the form of a published or unpublished opinion is immaterial; what matters is whether the court of appeals reached the correct result. As Respondent has shown, the court of appeals was correct to affirm, and Petitioners' dissatisfaction with the form of the court of appeals' opinion is not a basis for this Court's review.

CONCLUSION

For these reasons, the Petition should be denied.

[*Signature page to follow*]

Respectfully submitted,

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July 13, 2026