RECEIVED
Jul 30 2026
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellant Case No. 2026-001340
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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 102
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

JEFFREY T. AMMONS
S. WALLACE CARNWATH, III
WALKER, ALLEN, GRICE, AMMONS, FOY & KLICK, L.L.P.
Post Office Box 1068
Mount Pleasant, South Carolina 29465
(854) 529-0595

Counsel for Petitioners

TABLE OF CONTENTS

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 the principal issue on appeal, the Petitioners contend that the trial court not only abused its discretion by failing to consider the effectiveness of less drastic sanctions than striking their answer 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. Ironically, the Respondent's discussion of this key issue actually presents compelling reasons as to why a writ of certiorari should be granted.

For starters, the Respondent insists that the trial court states that less drastic remedies would simply not be adequate. While that may have been stated in an entirely conclusory manner by the trial judge, that is not adequate to allow for meaningful appellate review nor is it permissible under basic notions of due process. Clearly and indisputably, the trial court never identified a single "lesser sanction" that it considered and then rejected nor any reason why a lesser sanction was rejected. While essentially conceding that point with her silence, the Respondent attempts to place blame on the Petitioners for this lapse by the trial court. The Respondent insists that the Petitioners never asked the trial court to consider lesser sanctions. To that same point, the Respondent argues that the Petitioners never asked the trial court to explicitly identify in its rulings what lesser sanctions were considered and rejected. Remarkably, according to the Respondent's logic, a litigant has to make a formal request for a trial court to apply the proper legal standard, and if there is not a formal request to "follow the law," that failure to follow the law becomes a waived issue. That is not and cannot be the law.

In determining whether discovery conduct is worthy of sanctions and if so, what is the appropriate sanction, a trial court necessarily exercises discretion. To recap, in *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), 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). Yet, in order to obtain an affirmance in this case, the Respondent has the gall to insist that the trial court has no responsibility to follow the law and the standards laid down by this Court *unless* the trial court is *explicitly* asked to do so. Our system of justice is quite simply not that rigid.

In addition, the Respondent repeatedly states that the trial court indeed did exercise its discretion "appropriately." But how do they know? No one in this process is omniscient – not the Respondent, not her counsel, nor the Court of Appeals nor this Court. No one knows except the trial judge, and he never explained how or even if he exercised discretion, and if so, whether he properly exercised discretion. In that light, this case is the same as *Samples* and *Smith*. As this Court has made abundantly clear, the proper exercise of discretion simply cannot be assumed. Yet, that is what the Respondent is urging. She repeatedly states what cannot be proven from a reading of the sanctions order or from any other aspect of the circuit court record. She insists that the trial court "did not fail to weigh the required factors. It *studied them in detail* and concluded they supported the sanction imposed." *See*, Return to Pet. for Writ of Certiorari, p. 9. (Emphasis added). Really? Studied them in detail? Again, there is no record evidence or analysis in the sanctions order to support that assertion. It is pure speculation. The truth is no one (other than the trial judge) knows what his decision-making consisted of or whether he indeed studied the lesser sanctions in detail. The only way to know that, as *Samples* points out, is for the trial court to explain its reasoning, and as in *Samples*, that did not occur in this case. That alone warrants first the issuance of a writ of certiorari and ultimately reversal.

The same is equally true where the Respondent insists that the trial court "faithfully followed these precedents" and that the "Sanctions Order leaves no doubt that the court considered whether a lesser sanction would be adequate." *See*, Return to Pet. for Writ of Certiorari, p. 11. It should be quite evident that these bald pronouncements are not followed by any citation to the sanctions order. Contrary to the Respondent's apparent strategy, saying it is so does not make it so.

Finally, the Respondent actually offers the strongest reason for the issuance of a writ of certiorari. She writes that "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." *See*, Return to Pet. for Writ of Certiorari, p. 10. That very absence of clear and binding authority from this Court is precisely why a writ of certiorari is needed. The Petitioners actually cite the standard applied in the analogous context of a dismissal for failure to prosecute as well as other contexts where this Court explained the standard necessary to prove an exercise of discretion. *See, Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 60 (1997) (recognizing that an exercise of discretion for a governmental entity requires proof that the decision-maker was "faced with alternatives, actually weighed competing considerations and made a conscious choice"). The Petitioners further cited to the standard applied by the federal courts in this very situation. *See, Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995) (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"). *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"). But Respondent is *absolutely correct* – there is no explicit decision from this Court or the Court of Appeals laying out the appropriate test or standard under South Carolina law. And that is precisely why a writ of certiorari is warranted. The striking of an answer and placing litigants in default significantly impact due process and fundamental fairness concerns. The controlling law and the applicable test should be explicit.

Undoubtedly, South Carolina decision law is relatively limited on discovery issues for a number of reasons, including the requirement that a party be held in contempt for any discovery issue to be appealable – even after final judgment.[1] Thus, with due respect, this Court should

---

[1] As this Court ruled in *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), an aggrieved party has two choices: it "may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for failure to comply." 762 S.E.2d at 543. This Court stated that the "normal course" is "to refuse to comply, suffer contempt, and appeal from the contempt finding." *Id*. This onerous choice that faces a party which disagrees with a discovery order was recently reaffirmed by this Court in *Innovative Waste Management, Inc. v. Crest Energy Partners*, 445 S.C. 19, 911 S.E.2d 406 (2025), where the Court ruled that appellate review had been waived on discovery orders because the aggrieved party did not "preserve their objections

seize this opportunity to expand the bar and bench's understanding of the applicable law and the applicable test in this area. Due process will certainly be well served in that regard. But most importantly, trial judges will gain valuable instruction and guidance on the necessity of not only exercising proper discretion before striking an answer (i.e. the "shotgun blast" vis-a-vis the "rifle-shot"),[2] but also the absolute necessity of expressing the decision-making process to show that lesser sanctions were considered and rejected *and* why those lesser sanctions were rejected. In short, the Petitioners wholeheartedly agree with the Respondent's observation about the absence of a controlling South Carolina test or standard and need for such guidance from this Court for the proper adjudication of this case and moving forward.

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 have also 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*. As pointed out, the Respondent fully conceded that "Petitioners are correct that the circuit court did not identify any discovery abuse committed by Smoak." *See*,

---

to the prior discovery orders by immediately refusing to comply with the prior orders, suffering contempt, and appealing from the contempt finding." 911 S.E.2d at 410.

[2] *See*, *Balloon Plantation, Inc. v. Head Balloons, Inc*, 303 S.C. 152, 399 S.E.2d 439, 440 (Ct. App. 1990) (recognizing 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").

Respondent's Brief, p. 28. In its return in this Court, the Respondent does not walk that back, nor could she.

Instead, the Respondent relies on preservation as a basis for seeking an affirmance of the harshest sanction available – the "gunshot blast" -- against Michael Smoak, who everyone agrees did nothing wrong. Everyone also agrees that Smoak's counsel did nothing wrong.[3] The Petitioners have already addressed the flawed preservation argument in their petition. Needless to say, the issue was raised, and indeed, was discussed in part by the Respondent's counsel at the August 4, 2023 hearing as well as by the Petitioners. When the issue was not addressed by the trial court, the issue was again asserted by the Petitioners in their Rule 59(e) motion, just as Rule 59(e) and its controlling authority actually require to preserve an issue for appeal.[4]

In addition to a flawed preservation argument, the Respondent finds herself in the position of making a rather ill-conceived argument that sanctionable conduct may be imputed upon an entirely innocent party who everyone concedes *did no wrong*. She makes that argument by pointing out that Smoak and Murray Sand "are covered under the same liability insurance policy." *See*, Return to Pet. for Writ of Certiorari, p. 13. She never explains why that should remotely matter. No one is accusing the insurer of wrongdoing, nor the counsel retained by the

[3] To recap, 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). Hence, Smoak cannot be sanctioned for conduct by his defense counsel because the trial court made it clear that defense counsel did nothing wrong.

[4] It is also important to reiterate 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. Notably, in their return, the Respondent had no rebuttal to this point.

insurer to represent the Petitioners. She then insists that "Murray Sand has been responsible for the defense." *See*, Return to Pet. for Writ of Certiorari, p. 13. That is pure speculation; not surprisingly, that assertion includes no citation to the record. It is also a bit insulting to defense counsel – it is suggestive that counsel ignored their duties to Smoak and only represented Murray Sand. That is simply not true. The Respondent then claims – again without any evidence – that "Smoak necessarily had to rely upon Murray Sand to defend the case." *See*, Return to Pet. for Writ of Certiorari, p. 13. That again ignores the fact that Smoak has counsel representing him and indeed gave his sworn testimony in a deposition.

In short, to justify the ultimate sanction against Smoak, the Respondent adopts a legal theory that is equally unfounded and dangerous. The Respondent insists that any alleged wrongdoing in the discovery process may be imputed upon an innocent co-defendant. It should be remembered that Smoak was *no longer even employed* by Murray Sand when any of the alleged misconduct occurred. That novel theory – for which no supporting authority from South Carolina nor any other jurisdiction is offered – flies in the face of due process and fundamental fairness. Quite simply, Michael Smoak's right to due process should not be trodden upon in this manner. The trial court should not have ignored Smoak's rights, and the Court of Appeals should not have allowed the striking of Smoak's answer to stand where he admittedly committed no discovery abuse. This Court is again urged to grant a writ of certiorari to do what courts frankly play a major of role in doing – protecting the due process rights of litigants. A flawed preservation argument and this novel "theory" of "imputable sanctions" should not be allowed to be the basis for affirming the striking of Smoak's answer and holding him in default. He deserves better from our system of justice.

CONCLUSION

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

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 102
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

JEFFREY T. AMMONS #12419
S. WALLACE CARNWATH, III #81297
WALKER, ALLEN, GRICE,
AMMONS, FOY & KLICK, L.L.P.
Post Office Box 1068
Mount Pleasant, South Carolina 29465
(854) 529-0595

Counsel for Petitioners Michael D. Smoak and Murray Sand Company, Inc.

July 30, 2026