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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-000364

Richard A. Gorman Respondent,

v.

John C. Monarch Appellant.

**APPELLANT'S PETITION FOR REHEARING, MEMORANDUM IN SUPPORT
THEREOF, AND SUGGESTION FOR REHEARING EN BANC**

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Pursuant to Rule 221, SCACR, Appellant John C. Monarch, by and through his undersigned counsel, respectfully petitions the Court of Appeals for rehearing of matters decided by Opinion No. 2026-UP-317, filed June 24, 2026 (referred to hereinafter as “**the Opinion**”).

The Opinion affirms the trial court’s order striking Appellant’s answer and counterclaim as a discovery sanction—the most severe civil sanction available. Appellant respectfully submits that rehearing is warranted because the Opinion misapprehends or overlooks material facts and legal principles that bear directly on whether that sanction was authorized, proportionate, and consistent with South Carolina law.

Appellant fully recognizes that this Court does not reweigh evidence. However, abuse-of-discretion review still requires that reasonable evidence supports each finding necessary to justify the imposition of terminal sanctions. Accordingly, this Petition does not ask the Court to reconsider the weight of the evidence. Rather, it respectfully submits that the Opinion’s affirmance rests on several factual and legal premises that, upon closer examination of the Record, merit reconsideration, specifically concerning Appellant’s compliance with the relevant discovery orders, the effect of the April 28, 2023 conditional-sanctions order, the application of Rule 37(f), SCRCPP, and the showing required before a litigant’s pleadings may be stricken.

The foregoing issues independently warrant rehearing because they bear directly on the disposition of this appeal. They also present recurring questions concerning the administration of electronic discovery in South Carolina, including the intersection of discovery sanctions, electronically stored information, forensic inspection of personal electronic devices, privilege and privacy protections, and the proportionality analysis required before pleadings may be stricken. Existing South Carolina decisions provide important guidance, but this case presents an

opportunity to clarify how those principles apply in the context of modern ESI discovery and terminating sanctions.

For these reasons, Appellant respectfully requests rehearing and asks the Court to withdraw or modify the Opinion and, upon rehearing, reverse the order striking Appellant's answer and counterclaim and remand the case for trial. Because the issues presented implicate matters of recurring importance to both the Bench and Bar, Appellant also respectfully suggests rehearing en banc.

OVERVIEW OF THE CASE

The underlying facts and circumstances are complex. Appellant incorporates the portion of his Opening Brief that presents the background of this case in detail, (Appellant's Op. Br. at 4-20), and will here provide only an overview of significant facts and circumstances.

In 2013, Appellant and Respondent—who were strangers to each other—got into a fight on (what was then known as) Twitter over college football. Several weeks later, Respondent accused Appellant of attempting to blackmail him. It is alleged that, when the blackmail scheme failed, Appellant set about defaming Respondent, accusing Respondent of being a pedophile. On December 20, 2013, Respondent's legal counsel sent Appellant a document preservation letter. Respondent did not file the underlying lawsuit against Appellant until August 8, 2014.

During or about January 2018, Appellant learned that Respondent owned and operated a fake-news website through which Respondent had published articles attacking Appellant and his business, accusing Appellant of criminal conduct, and claiming that Appellant is responsible for causing another's death by suicide. These allegations partly form the basis of Appellant's counterclaim for defamation (which is presently dismissed).

In August 2020—and for the first time in the case, Respondent sought discovery as to electronic devices that Appellant had been using during 2013. This was 6 years after the complaint was filed. On August 21, 2020, the parties entered into a consent discovery order (“**the August 2020 Order**”) that, with respect to Appellant’s electronic devices, required two things: (1) Appellant would provide a list of electronic devices he used in 2013; and (2) the parties would “cooperate concerning the expeditious provision of such devices from the list as [Respondent] may select for examination by [Respondent] of such persons as he may choose.” (R. 32.) In response to the August 2020 Order, Appellant identified two electronic devices that he used in 2013—an iPhone 5 and a MacBook Pro laptop; Appellant further advised that he thought these specific devices had been traded in years earlier, but that, at least with respect to the laptop, the data from that device had been transferred to a newer computer. Appellant would later locate the actual laptop that he was using during 2013 and produce that device to a forensic examiner, who, during the course of his examination, also found a complete backup copy of data from Appellant’s iPhone 5 stored on that device.

With respect to the “cooperation” requirement of the August 2020 Order, Respondent took the position that Appellant had waived any and all rights that he had to withhold information; all information that was on the computer—be it private, confidential, sensitive, privileged, or utterly irrelevant—had to be produced. Appellant disagreed, especially because Respondent had already been publicly maligning Appellant on Respondent’s fake-news website. This dispute resulted in an order entered on March 28, 2022 (“**the March 2022 Order**”), in which the trial court established a protocol through which Appellant’s electronic devices would be subject to third-party inspection.

Appellant maintained that compliance with the protocol, as written, was technologically, practically, and financially impossible. There was a terabyte of data on Appellant's computer, and under the protocol, Appellant had 21 days to review the entire contents of the device, flag documents for objection, and produce a privilege log. There was no practical or financial way for Appellant to comply with the order. (Appellant's Op. Br. at 26-27.) Not even the forensic examiner could comply with the court-ordered protocol, as it was technologically impossible to do so. (Appellant's Op. Br. at 29.)

Consequently, Appellant filed a motion pursuant to Rule 59(e) so the trial court could amend the protocol. However, by order entered January 12, 2023, the motion for reconsideration was denied. Then, by order entered April 28, 2023 ("**the April 2023 Order**"), the trial court imposed conditional sanctions on Appellant, which required Appellant to comply with the March 2022 Order within 45 days; otherwise, his answer and counterclaim would be stricken and he would be fined. Appellant complied and turned his computer over to a third-party forensic expert for analysis.

As referenced above, when the forensic expert received Appellant's computer, he immediately advised the parties that it was technologically impossible for him to perform his analysis in the manner required by the March 2022 Order. Instead, the expert asked the parties to provide keyword search terms for potentially relevant documents, as well as for matter that might be privileged. The parties did so. This protocol was substantially the same as the one Appellant had previously proposed to the trial court. As a result of this exercise, the amount of data retrieved from Appellant's laptop was reduced from 1 terabyte to a little more than 9000 files, which was further reduced by culling out privileged material and file duplicates.

Furthermore, in conducting his analysis, the expert located an entire mirror-image backup of the iPhone 5 that Appellant was using in 2013. Therefore, not only did Respondent obtain relevant information from the laptop identified under the August 2020 Order, he obtained relevant information from the mobile phone identified under that Order. And, critically, Appellant's privacy interests were protected.

As a result of the inspection, no information was yielded that implicated Appellant in having attempted to blackmail Respondent, or in having called Respondent a pedophile. In fact, at no time in more than 10 years of litigation has Respondent ever produced any evidence, or identified any witness, that implicates Appellant in any of the wrongful conduct that Respondent has accused him of.

However, following several forensic inspections, Respondent filed a motion for sanctions that has resulted in these appellate proceedings. Respondent argued that the absence of inculpatory information resulted from Appellant's destruction of evidence, a position ultimately accepted by the trial court. However, Appellant maintains that none of the three forensic examiners identified any specific relevant information that had been lost, when any such loss occurred, or whether any such loss resulted from deliberate conduct rather than the routine, good-faith operation of the electronic information system.

Regardless, on February 26, 2025 (**"the February 2025 Order"**), the trial court entered an order granting Respondent's motion for sanctions and striking Appellant's answer and counterclaim. These appellate proceedings followed. And throughout these proceedings, Appellant's position has been that compliance with the April 2023 Order satisfied the only discovery order expressly conditioning the striking of his answer and counterclaim upon future noncompliance.

MATTERS FOR WHICH REHEARING IS SOUGHT

In brief, Appellant seeks rehearing as to all matters decided in the Opinion. Without limiting the generality of this request, Appellant has endeavored to organize the issues for which rehearing is sought around the following categories.

I. THE OPINION MERITS RECONSIDERATION IN LIGHT OF THE RECURRING PRINCIPLES REFLECTED IN SOUTH CAROLINA’S DISCOVERY SANCTIONS JURISPRUDENCE.

The Opinion affirms the February 2025 Order by addressing the individual issues raised on appeal. Respectfully, however, the Opinion does not expressly analyze several considerations that South Carolina appellate decisions have consistently regarded as relevant when determining whether the extraordinary sanction of striking a party's pleadings is warranted.

At Pages 21-23 of his Opening Brief, Appellant synthesized the reported South Carolina appellate decisions regarding terminating discovery sanctions. The Opening Brief did not propose a new legal standard. Rather, it identified the recurring considerations reflected in those decisions and organized them into a single analytical framework through which the propriety of striking a party's pleadings may be evaluated. Respectfully, Appellant submits that the application of those recurring principles to the Record merits reconsideration of the Opinion. Those recurring considerations are as follows:

1. Whether the sanctioned party has violated a discovery order of the trial court;
2. If so, whether that party was expressly warned that a violation of the court’s discovery order would result in the striking of its pleadings, or has otherwise disregarded prior orders of the court through which discovery sanctions were imposed;
3. Whether, in response to the court’s discovery order, the sanctioned party has failed in substantial part to comply with the order;

4. Whether the sanctioned-party's failure to comply with the court's discovery order was willful or deliberate (or otherwise demonstrates willful or deliberate indifference to the opposing party's discovery rights), or whether the sanctioned-party's failure to comply was justified;
5. Whether and to what extent the party seeking the sanction of a stricken pleading has been prejudiced by the sanctioned-party's conduct;
6. Whether and to what extent the sanctioned party will be prejudiced by the imposition of a sanction striking its pleadings; and finally,
7. Whether the sanction of striking a party's pleadings is necessary under the circumstances, or whether a less-severe sanction is warranted.

Although no single South Carolina decision has expressly articulated these considerations as a unified test, each is reflected in the appellate decisions discussed in Appellant's Opening Brief. These considerations are neither novel nor exhaustive; rather, they represent recurring principles reflected throughout South Carolina's discovery sanctions jurisprudence. This Petition respectfully submits that viewing those principles collectively demonstrates why reconsideration of the Opinion is warranted. The remaining sections explain why, when those principles are applied to the Record before the Court, several factual and legal premises underlying the Opinion merit reconsideration.

Although the Opinion repeatedly concludes that reasonable evidence supports the trial court's findings, the matters presented by this Petition involve whether those findings, taken together, satisfy the principles that South Carolina appellate decisions have consistently regarded as relevant before affirming the extraordinary sanction of striking a party's pleadings. Put differently, this Petition does not challenge the standard of review employed by the Opinion;

rather, it respectfully submits that the Record, when evaluated under that standard and through the recurring principles reflected in South Carolina precedent, warrants a different result.

II. THE COURT MISAPPREHENDED OR OVERLOOKED THE PORTIONS OF THE RECORD WHICH DEMONSTRATE THAT APPELLANT COMPLIED WITH THE AUGUST 2020, MARCH 2022, AND APRIL 2023 ORDERS.

The Opinion concludes that reasonable evidence supports the trial court's determination that Appellant failed to comply with the August 2020, March 2022, and April 2023 Orders. Respectfully, the Record reflects a materially different history.

In relevant part, the August 2020 Order only required two things from Appellant: (1) to disclose the electronic devices he had been using during and about 2013—which Appellant did; and (2) to cooperate with Respondent about production of the devices for forensic inspection—which Appellant did, though those discussions reached an impasse due to Respondent's insistence that Appellant had waived all rights to protect information that was not relevant, or was otherwise personally sensitive, confidential, or privileged.

The March 2022 Order directed Appellant to provide the electronic devices for physical inspection. But—and this cannot be stressed enough—it was literally impossible for Appellant to do so. Not only was it technologically impossible for the forensic examiner to comply with the trial court's protocol, but just as importantly, it was practically and financially impossible for Appellant to comply with the protocol while maintaining any semblance of protection for his personally sensitive, confidential, or privileged information—particularly in the face of a litigation opponent who had already used a fake-news website to publicly shame Appellant.

Regardless, through the April 2023 Order, the trial court ordered Appellant to comply with the prior discovery orders within 45 days, otherwise his pleadings would be stricken. Appellant complied. And, in a trial court order entered on January 18, 2024 (denying one of

Respondent's many efforts to obtain discovery sanctions against Appellant), the trial court at least tacitly acknowledged that Appellant had complied with the prior discovery orders by producing his electronic devices for inspection. (R. 85.) Appellant would respectfully suggest that the Opinion does not account for the significance of the January 18, 2024 order. And there do not appear to be any cases in South Carolina where a party has been sanctioned—particularly with the sanction of having his pleadings stricken—despite complying with the trial court's discovery orders.

The express purpose of the April 2023 Order was to compel future compliance through a conditional sanction. Once Appellant complied within the prescribed 45-day period, the condition upon which the threatened sanction expressly rested was satisfied. The Opinion does not address the significance of that subsequent compliance. If compliance with the April 2023 Order could not avert the threatened sanction, the conditional nature of that Order was rendered illusory.

The Opinion further concludes that reasonable evidence supports the trial court's findings regarding failure-to-preserve or destruction of electronically stored information. Respectfully, Appellant submits that the Record does not support several premises underlying that conclusion.

The events giving rise to Respondent's claim occurred in 2013; Respondent did not seek electronic discovery for the devices that Respondent was using until 2020. Nonetheless, Appellant still had the very laptop he had been using in 2013 and produced it for inspection, and the forensic examiner located a complete backup of the iPhone that Appellant was using in 2013 on that device.

It was Respondent's contention—which the trial court adopted—that Appellant had destroyed potentially relevant evidence from these data repositories. Respectfully, the Record does not establish the factual predicates necessary to support that conclusion.

Even assuming that the trial court was entitled to credit certain forensic examiners over others, the resulting reports still did not identify what relevant information was lost, when it was lost, how it was lost, or whether Rule 37(f) applied. The first forensic examiner—Abrams—suggested that discrepancies in file-creation or file-access dates may have resulted from some kind of data manipulation. However, the next two forensic examiners—Watkins (retained by Respondent) and Finch (retained by Appellant)—explained that Abrams' own data-capture software probably resulted in the date-discrepancies that Abrams' highlighted as a concern.

For his part, Watkins suggested there was evidence of deletion of internet history files and other administrative files on Appellant's laptop. However, Finch explained that internet history files are routinely deleted by the internet-browsing software that was utilized by Appellant's laptop and there was no evidence of those files having been intentionally deleted. Watkins conceded that this likely accounts for the loss of internet-browsing history. And this conclusion intersects with Rule 37(f), SCRCP, which provides that sanctions are not appropriate for "electronically stored information lost as a result of the routine, good-faith operation of an electronic information system," unless there are "exceptional circumstances." In sanctioning Appellant, the trial court was not presented with evidence of "exceptional circumstances," much less made any finding that "exceptional circumstances" existed that warranted the imposition of terminal sanctions.

And as for the loss of administrative files, Finch explained that the information which would have been reflected in such files is preserved elsewhere on the laptop. Watkins did not dispute this opinion.

In short, the only evidence of information lost from Appellant's electronic devices appears to have been limited to internet-browsing history, which—according to the undisputed opinions of the forensic examiners—resulted from the routine operation of the internet-browsing software itself.

Respectfully, the Record demonstrates that Appellant complied with the only order expressly conditioning the striking of his answer and counterclaim upon future noncompliance. Permitting prior discovery disputes to serve as the basis for the conditional sanction after the condition itself has been satisfied deprives the conditional nature of the April 2023 Order of any operative effect. The remaining findings concerning alleged destruction of electronically stored information likewise do not establish the legal predicates necessary to justify the extraordinary sanction imposed. Accordingly, Appellant respectfully submits that the Opinion's affirmance of the February 2025 Order merits reconsideration.

III. THE OPINION DOES NOT ACCOUNT FOR THE CIRCUMSTANCES DEMONSTRATING THAT APPELLANT'S CONDUCT WAS JUSTIFIED.

The Opinion affirms the trial court's conclusion that Appellant was unjustifiably dilatory in complying with the discovery orders. Respectfully, the Record reflects circumstances that materially bear upon whether Appellant's conduct was justified and whether the delays identified by the Opinion should be viewed differently.

The Opinion does not appear to account for the circumstances that led Appellant to seek meaningful protections for sensitive and privileged information before producing his electronic devices. By the time Respondent first sought forensic inspection of Appellant's electronic

devices in 2020, Respondent had already publicly accused Appellant of extortion, bank fraud, and causing another person's death through articles published on Respondent's own website. (R. 212.) Appellant's concern was not speculative or generalized. It arose from Respondent's documented history of publicly disseminating accusations about Appellant, making Appellant's insistence on meaningful protections for irrelevant, confidential, and privileged information objectively reasonable under the circumstances. And under those circumstances, when Respondent asserted that the August 2020 Order required production of all information on Appellant's devices—including irrelevant, confidential, and privileged material—Appellant had a legitimate basis to challenge that interpretation and to seek meaningful privacy protections before production.

This resulted in the March 2022 Order, which established a forensic protocol that neither Appellant nor the designated forensic examiner could comply with. As referenced above, when the forensic examiner received Appellant's laptop for inspection, the examiner immediately notified the parties that—as a technological matter—he could not comply with the trial court's order. For Appellant's part, he could not comply with March 2022 Order, either. As explained in Appellant's Opening Brief, (at Pages 26-27), compliance with the protocol would have required the review of an enormous volume of data within an unworkable timeframe at prohibitive expense.

No one disputes the fact that Respondent is entitled to pursue his legitimate discovery interests within the bounds of the Rules of Civil Procedure. And it should not be controversial that Appellant—despite being a party to civil litigation—retains his own rights to the privacy of his personal, sensitive, and confidential information, especially on matters that are not relevant to the underlying litigation, as well as to protections for privileged information. Yet the March

2022 Order—which the April 2023 Order required Appellant to satisfy as a condition of avoiding sanctions—afforded Appellant no practical means of protecting legitimate privacy and privilege interests while simultaneously complying with the protocol imposed. Under these circumstances, Appellant was forced to choose between surrendering those protections or seeking judicial relief. The trial court ultimately imposed terminal sanctions after Appellant sought judicial protection for legitimate privacy and privilege interests—protections that the forensic examiner himself later implemented through a keyword-search protocol substantially consistent with the approach Appellant had advocated before entry of the March 2022 Order.

Regardless, these circumstances demonstrate that Appellant’s actions were directed toward protecting legitimate privacy and privilege interests, not delaying discovery. They therefore bear directly upon whether any delay was justified, whether it was willful, and whether the extraordinary sanction ultimately imposed was proportionate. The Opinion does not expressly address the significance of those circumstances. Appellant was not dilatory with respect to the discovery orders. Rather, he acted to protect legitimate privacy and privilege interests while pursuing compliance with the trial court’s orders, and he ultimately complied in full with the April 2023 Order.

IV. THE OPINION MISAPPREHENDED THE PREJUDICE TO RESPONDENT.

The Opinion concludes that reasonable evidence supports the trial court’s finding that Respondent suffered significant prejudice as a result of Appellant’s conduct. Respectfully, the Record does not establish the nature or extent of that prejudice, nor does it demonstrate that any unavailable evidence impaired Respondent’s ability to prove his claims.

In what is now 12 years of litigation, Respondent has never identified any witness or any document that can substantiate his claims of blackmail or defamation. Three forensic examiners

reviewed Appellant's electronically stored information and found no evidence implicating Appellant in the wrongful conduct of which he has been accused. Nor did those examinations identify evidence that relevant electronically stored information had once existed but had later been lost or destroyed. The February 2025 Order acknowledges that no one knows what information may have been lost from Appellant's electronic devices, how such information was lost, or when it was lost. And neither the February 2025 Order nor the Opinion identifies what unavailable evidence prevented Respondent from proving any element of his claims. Respectfully, prejudice cannot be measured by evidence whose existence, content, timing, and relevance are all unknown. Absent that causal connection, the Record does not establish that any inability to prove Respondent's claims resulted from Appellant's conduct rather than from the absence of supporting evidence in the first instance.

Respectfully, the Record demonstrates that Respondent's inability to substantiate his claims existed independently of any alleged loss of electronically stored information. Because the Record does not establish that any unavailable evidence impaired Respondent's ability to prove his claims, the Opinion merits reconsideration insofar as it affirms the trial court's finding of significant prejudice.

V. THE OPINION DOES NOT ACCOUNT FOR THE PREJUDICE IMPOSED UPON APPELLANT.

The Opinion affirms the February 2025 Order without addressing whether the substantial prejudice imposed upon Appellant bears upon the propriety of the extraordinary sanction affirmed. Respectfully, the Record demonstrates that striking Appellant's pleadings not only deprived him of the ability to defend against Respondent's claims, but also extinguished Appellant's affirmative counterclaim without any adjudication on the merits. Nothing in either the February 2025 Order or the Opinion reflects any consideration of the substantial prejudice

imposed upon Appellant by extinguishing both his defenses and his affirmative claims. Respectfully, the absence of any consideration of that substantial prejudice bears directly upon whether the extraordinary sanction imposed was proportionate.

In Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), this Court reversed a terminal sanctions order where doing so would confer a “windfall” upon the opposing party. Here, the sanctions accomplished precisely that result. Respondent obtained judgment on his claims without proving them while simultaneously eliminating Appellant’s affirmative defamation claim—arising from Respondent’s public accusations of extortion, bank fraud, and causing another person’s death—without any adjudication on the merits. The sanctions therefore not only relieved Respondent of his burden of proof but also foreclosed Appellant’s opportunity to obtain judicial redress for those alleged defamatory statements.

Respectfully, because neither the February 2025 Order nor the Opinion appears to account for the substantial prejudice imposed upon Appellant or the resulting windfall to Respondent, the Opinion merits reconsideration.

VI. CONCLUDING STATEMENT & SUGGESTION OF REHEARING EN BANC

For the reasons set out above, Appellant respectfully requests this Court to reconsider the Opinion and to grant a rehearing of the matters decided therein. Also, pursuant to Rule 219(b), SCACR, this Petition is joined by a suggestion for rehearing en banc.

Respectfully submitted,

s/ Steven Edward Buckingham

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PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellant's Petition for Rehearing, Memorandum in Support Thereof, and Suggestion for Rehearing En Banc

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