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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Robert J. Bonds, Circuit Court Judge
The Honorable Deadre L. Jefferson, Circuit Court Judge
The Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2026-000244
Case No. 2011-CP-10-07166

Otha M. Delaney, Octavia D. Watson, Alicia S. Alston and Paul McGuiggan, Jr., individually and on behalf of all others similarly situated Respondent/Appellant,

v.

First Financial of Charleston, Inc., Appellant/Respondent.

AND

Otha M. Delaney, Octavia D. Watson, Alicia S. Alston and Paul McGuiggan, Jr., individually and on behalf of all others similarly situated as Co-Class Representatives Appellants,

v.

First Financial of Charleston, Inc., Appellant/Respondent.

**APPELLANT/RESPONDENT FIRST FINANCIAL OF CHARLESTON, INC.'S
INITIAL RESPONDENT'S BRIEF**

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION IN REFUSING TO GRANT SPOILIATION SANCTIONS AGAINST APPELLANT/RESPONDENT?

STATEMENT OF THE CASE¹

Appellant Otha Delaney (“Delaney”) borrowed money from Respondent First Financial of Charleston, Inc., (“FFC”) for the purchase of a truck.² (Original Complaint ¶¶ 13–17; Def.’s App’x of Exs. for Summary J. Mem., filed April 22, 2025 (“App.”) pp. 327–28). FFC is a small (six employee) consumer finance company in North Charleston. (2021 VanHook Depo Tr. p. 8:11-21; *id.* at p. 31:22-23). Delaney granted FFC a security interest in the truck in exchange for \$8,499 to be repaid under the specific terms contained in the loan. (Original Complaint ¶¶ 13–17; App. pp. 327–28). Within months, by early 2008, Delaney defaulted on the loan. Following Delaney’s default on the loan, FFC repossessed and sold the truck. Delaney *does not* contest the default, repossession, or sale. Instead, Delaney asserts that the notices used by FFC fail to strictly comply with South Carolina’s adoption of the Uniform Commercial Code (“SC UCC”).³ Specifically, notices sent prior to (the “Pre-Sale Notice”) and following (the “Post-Sale Notice”) the private sale (i.e., disposition) of the collateral (i.e., the truck).

Delaney sued as a putative class representative in October 2011. FFC responded with a

¹ A detailed Statement of the Case and Factual Background was included in Appellant/Respondent’s Initial Appellant’s Brief. Appellant/Respondent sets forth an abbreviated Statement of the Case and factual background regarding the specific issue addressed in this appeal but incorporates the Statement of the Case and factual background in its July 13, 2026, Initial Brief.

² Delaney is used as the exemplar; the newly added “co-class representatives” were not included as named representatives until after FFC filed its Notice of Appeal in this consolidated appeal. Even so, the factual background would be the same regardless of who is used aside from which version of the particular notice might have been sent to the particular individual, and varying terms of the loans themselves (e.g., amount, collateral, rate, etc.).

³ Appellants’ Initial Brief contains argument regarding whether the subject notices complied with the SC UCC and the requirements under the SC UCC. The compliance of the subject notices with the SC UCC is immaterial in Appellants’ appeal and should not be considered by this Court for this appeal. FFC explicitly contests Appellants’ assertion that the subject notices failed to comply with the SC UCC, and, to the extent necessary, FFC incorporates the arguments raised in its initial brief filed July 13, 2026, regarding the compliance of the subject notices.

successful motion to dismiss—before a class was certified, and before any discovery was answered. The appeals process finally concluded in 2019, resulting in the overturning of dismissal, and the beginning of discovery. Considering the procedural history and passage of time, FFC no longer had copies of the notices sent to individuals between approximately October 2008 through December 2011. Delaney questioned FFC’s 30(b)(6) designee about the same in April 2021; however, his unsuccessful motion for spoliation sanctions (the denial of which he now appeals) was not filed until August 2024.⁴ Delaney did not concretely identify the specific sanction requested,⁵ but rather suggested vague nuclear options for the court to take, such as presuming the number of class members and damages and striking FFC’s answer in full. The circuit court correctly exercised its discretion, finding Delaney did not meet his burden and refusing sanctions.

FACTS

Delaney filed suit on October 4, 2011, and served FFC on October 11, 2011. Original Complaint; Affidavit of Service. The original Complaint brought claims only regarding the Pre-Sale Notice under the SC UCC. (Original Complaint ¶¶ 13; 14; 15; 18 19; 20). Delaney’s original Complaint was the first notice FFC received of any claim regarding its form’s compliance with the SC UCC—FFC believed⁶ that the forms complied with the SC UCC. (Tr. Depo. Will VanHook April 2021 at 61:19-25).

Appellants sent interrogatories, requests for production, and requests for admission to FFC

⁴ Prior to filing the August 2024 spoliation sanctions motion that he eventually pursued, Delaney filed but ultimately withdrew spoliation sanctions motions in April 2022 and June 2022. (Pl.’s Mot. filed 4/7/22; Order Withdrawing Mot. filed 6/6/22; Pl.’s Mot. filed 6/9/22; Notice of Motion Withdrawal filed 2/26/24).

⁵ Indeed, in his own brief, Delaney admits that it was not until the hearing “on Plaintiffs’ *Motion to Reconsider* the Denial of Sanctions” that “Plaintiffs’ counsel requested the court (1) enter an order finding FFC had a duty to preserve the records, (2) enter an order acknowledging FFC itself states there is no way to identify those class members, (3) give Plaintiff the opportunity to submit to the court a proposal from a class-action notice professional, (4) give FFC the opportunity to object to that proposal, (5) provide the opportunity to submit an attorneys’ fee affidavit, and (6) determine a way to calcite the class members’ damages. (Appellants’ Br. p. 18 n.7) (*emphasis added*).

⁶ To be clear, FFC still maintains that the Pre- and Post-Sale Notice forms used by FFC comply with the SC UCC.

on February 28, 2012. (February 22, 2012, Letter Serving Delaney’s First Discovery Requests). Appellants’ requests for production included only three items: (1) all files concerning Otha Delaney; (2) documents identified in response to the interrogatories; and (3) the specific Pre-Sale Notice form sent to Delaney. (Delaney Requests for Production). Appellants did not request documents related to any other person. (Delaney Requests for Production). The parties entered into a consent agreement, delaying FFC’s response to Delaney’s discovery requests until after the court ruled on FFC’s motion to dismiss. (March 29, 2012, Order). The circuit court thereafter granted FFC’s motion to dismiss. Order Granting Motion to Dismiss. Delaney moved to reconsider, which was denied. Motion to Reconsider, Denial of MTR.

Delaney appealed, and this Court affirmed the dismissal. (*Delaney v. First Fin. of Charleston, Inc.*, 418 S.C. 209, 222, 791 S.E.2d 546, 552 (Ct. App. 2016), *rev’d*, 426 S.C. 607, 829 S.E.2d 249 (2019)). Delaney failed to timely petition for rehearing, and this Court properly sent remittitur. (Remittitur dated October 19, 2016).⁷ Nevertheless, Delaney filed an untimely motion to increase the time to file a petition for rehearing, which this Court granted over FFC’s objection. (October 20, 2016, Motion for Extension of Time; October 28, 2016, FFC’s Objection to Motion for Extension). This Court then, over FFC’s objection, recalled remittitur. (November 2, 2016, Remittitur Recall). The petition for rehearing was denied, and Delaney petitioned the Supreme Court of South Carolina for a writ of certiorari. (February 16, 2017, Denial of Rehearing; Delaney’s Petition for Writ of Certiorari). Over FFC’s objection, the petition was granted, and the Supreme Court reversed this Court, reviving the dismissed case. (*Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 614, 829 S.E.2d 249, 252 (2019); *see also* May 11, 2017, FFC Motion to Dismiss;

⁷ It is FFC’s position that the proper sending of remittitur concluded the case. *See Stogsdill v. S.C. Dep’t of Health & Hum. Servs.*, 415 S.C. 568, 569, 784 S.E.2d 669, 670 (2016) (“The sending of the remittitur ended appellate jurisdiction over this case, and no further motions will be entertained after the remittitur is sent.”).

May 11, 2017, Return to Petition for Writ of Certiorari).

This case proceeded through litigation, including the exchange of discovery. FFC answered Appellants' initial discovery requests on October 23, 2019. (October 23, 2019, FFC Answers to Delaney's First Discovery Requests).

In 2021, nearly two years after our Supreme Court sent remittitur, and a decade after originally bringing this action, Appellants amended their Complaint. (First Amended Complaint). The amended Complaint included, for the first time, allegations related to the post-sale notices sent by FFC. (First Amended Complaint ¶ 61). FFC again moved to dismiss, which was denied. (Motion to Dismiss Amended Complaint; Order Denying Motion to Dismiss Amended Complaint).

On April 7, 2022, Appellants first moved for sanctions regarding the alleged spoliation of evidence.⁸ (April 7, 2022, Motion for Sanctions). This was withdrawn via Order filed June 6, 2022. (June 6, 2022, Order). Appellants again moved for sanctions regarding the alleged spoliation of evidence on June 9, 2022. (June 9, 2022, Motion for Sanctions). This Motion was again withdrawn on February 26, 2024. (February 26, 2024, Notice of Withdrawal of Plaintiffs Motions). On August 6, 2024, Appellants thrice moved for sanctions regarding the alleged spoliation of evidence. (August 6, 2024, Motion for Sanctions). The motion was argued before The Honorable Judge Van Slambrook on November 5, 2024. (December 12, 2024, Consent Order). On December 12, 2024, a consent order was entered regarding the Motion for Sanctions, as well as other motions heard that day. (December 12, 2024, Consent Order). In relevant part, the Order continued the motion for sanctions on the condition that the only remaining portion of the motion was the alleged spoliation of documents between “approximately October 2008 through December 2011.”⁹

⁸ This Motion, along with the later-filed motions for sanctions, also included other Motions not relevant to Appellants' appeal.

⁹ These records are hereinafter simply referred to as the “Records.” The Records are merely copies of form documents—in this case, the same as the form document received by Delaney himself.

(December 12, 2024, Consent Order). This motion, specifically constrained to the alleged spoliation, was then heard by The Honorable Judge Bonds and denied by order filed January 22, 2026. (Form 4 Order filed January 22, 2026). Appellants filed a motion to reconsider on February 2, 2026. (Motion to Reconsider January 22, 2026, Order). The circuit court denied Appellants' motion to reconsider via form 4 Order on February 26, 2026, and issued a formal Order on March 10, 2026. (Form 4 Order filed February 26, 2026; Order filed March 10, 2026).

The only evidence in the record regarding the disposition of the Records is testimony from Mr. VanHook, the 30(b)(6) representative (and president) of FFC. (2021 VanHook Depo Tr. 10:12-13). Mr. VanHook testified that he did not know what a "class member" was. (2024 VanHook Depo Tr. 39:10-11). He testified that he was not familiar with class action lawsuits and had no idea how many people would be in the class. (2024 VanHook Depo Tr. 40:16-41:14). Mr. VanHook was unfamiliar with litigation holds. (2021 VanHook Depo. Tr. 19:19-25; 21:22-23). Nevertheless, Mr. VanHook genuinely believed that he held all the documents that were required under the lawsuit—the documents related specifically to Otha Delaney. (2021 VanHook Depo. Tr. 22:4-16). Mr. VanHook testified that, as to the remaining individuals, he followed standard South Carolina requirements for holding account information and did not know that any other person's file needed to be retained. (2021 VanHook Depo. Tr. 22:16-21). Mr. VanHook testified that he kept the files according to the statutes, and, specifically noted that the case "went into dismissal[.]" (2021 VanHook Depo. Tr. 24:4-10).

Mr. VanHook testified that he believed the Records were required to be kept for 26 months by the State. (2021 VanHook Tr. 30:5-13). To destroy Records outside of the 26-month State mandated retention policy, a clerical worker would go to their files, grab the files past the operative time period, and either shred or throw the files away. (2021 VanHook Tr. 30:22-31:1). Mr.

VanHook was unable to recall when the switch from throwing the files away to shredding occurred; however, the shredding occurred monthly or when otherwise called by FFC. (2021 VanHook Tr. 33:4-32:5). Contrary to Appellants' assertions, Mr. VanHook never testified that there was "no other way to obtain the information in the records that were lost¹⁰[:]" rather, Mr. VanHook only testified that *FFC* did not have the Records and that *he* did not know how to locate the individuals who may have been included in the Records. (2024 VanHook Tr. 88:6-89:10). There are other ways of obtaining the information in the Records, as Appellants successfully located two additional individuals (through undisclosed means), McGuiggan and Alston, who have now intervened in this action.¹¹ (Affidavit of Alston; Affidavit of McGuiggan). Both Alston and McGuiggan set forth time periods in their sworn affidavit, and both would have fallen within the time-period challenged by Appellants. (Affidavit of Alston; Affidavit of McGuiggan).

STANDARD OF REVIEW

Generally, the decision to grant or deny a motion for sanctions falls within the sound discretion of the circuit court. *See Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009). Stated differently, an appellate court will find an abuse of discretion when it "is in substantial or violent disagreement" with the circuit court's discretionary ruling. *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988). Specific to sanctions, an abuse of discretion can occur where the appellant shows the circuit court's conclusion "was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Skywaves I Corp. v. BB&T Co.*, 423 S.C. 432, 456-57, 814 S.E.2d

¹⁰ Apps. Initial Brief at p.14.

¹¹ FFC challenges the circuit court's grant of intervention in its appeal.

643, 656 (Ct. App. 2018) (quoting *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)).

ARGUMENT¹²

I. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR SPOILIATION SANCTIONS.

A. Appellants failed to show that FFC's conduct warranted sanctions under South Carolina law.

Appellants advance a test employed by the federal courts that does not appear to have been adopted by the South Carolina courts. Rather, South Carolina courts appear to treat spoliation sanctions with the same considerations as other discovery sanctions. *See Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 151-52, 714 S.E.2d 537, 541 (2011) (declining to adopt the tort of spoliation while noting that other remedies exist); *see also Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (reversing the failure to sanction spoliation of evidence); *QZO, Inc. v. Moyer*, 358 S.C. 246, 258, 594 S.E.2d 541, 548 (Ct. App. 2004) (affirming sanctions following the spoliation of evidence following the refusal to comply with an order of the circuit court).

When examining discovery sanctions, our Supreme Court has held that the courts “must consider the nature of the discovery refused, the discovery stage of the case, willfulness, and prejudice.” *Welch v. Advance Auto Parts, Inc.*, 445 S.C. 640, 655, 916 S.E.2d 320, 328 (2025). “[T]he sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct. App. 1999). The

¹² To the extent that this Court agrees with FFC's arguments in its appeal that Delaney's bankruptcies, and his repeated failure to disclose them, render void all orders of the court and prevent Delaney from acting as class representative, then this Court must also deny Appellant's appeal because the order Delaney appealed is void.

resulting sanction implicates the “culpable state of mind” that the offending party had. For example, “Where the effect [of the sanctions] will be the same as granting judgment by default or dismissal,” such sanctions may be imposed “only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.” *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); see *Skywaves I Corp. v. BB&T Co.*, 423 S.C. 432, 457, 814 S.E.2d 643, 657 (Ct. App. 2018) (“Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction.”); see also *Orlando*, 320 S.C. at 511, 466 S.E.2d at 355 (“A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.”). “The courts have generally held that . . . some element of bad faith, willfulness, or callous disregard of the rights of other litigants [is required] in order to justify imposition of such a sanction.” *Balloon Plantation v. Head Balloons*, 303 S.C. 152, 154-55, 399 S.E.2d 439, 440 (Ct. App. 1990) (quoting 4A J. Moore, J. Lucas & D. Epstein, *Moore’s Federal Practice* ¶ 37.03[2], at 89 (2d ed. 1990)). Regardless, “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*, 303 S.C. at 154, 399 S.E.2d at 440 (Ct. App. 1990); see also *id.* (“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. In the instant case, the sanction was a hydrogen bomb. The defendants were denied the opportunity to present a defense.”). Here, the Appellants must show the Court that the decision of the circuit court “was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.” See *Skywaves I Corp.*, 423 S.C. at 456-57, 814 S.E.2d at 656 (quoting *Karppi.*, 327 S.C. at 542, 489 S.E.2d at 681).

Appellants have failed to show that the circuit court’s decision was without “reasonable

factual support” and the circuit court properly considered the nature of the discovery, the discovery posture of the case, willfulness, and the prejudice that resulted therefrom. *See id.* The subject matter of the Records are not disputed—the form received by Delaney are the same as those received by any other person during the 2008-2011 time period. *See Welch*, 445 S.C. at 655, 916 S.E.2d at 328 (holding that the courts “must consider the nature of the discovery refused, the discovery stage of the case, willfulness, and prejudice.”). Furthermore, FFC has not refused to provide any discovery. *See id.*

With respect to the posture of discovery, Appellants did not send a preservation letter or request these documents of any purported class member other than Delaney himself. *See Welch*, 445 S.C. at 655, 916 S.E.2d at 328 (holding that the courts “must consider the nature of the discovery refused, the discovery stage of the case, willfulness, and prejudice.”). Appellants knew (or should have known) that the Records were no longer in the possession of FFC by, at the latest, Mr. VanHook’s 2021 deposition. *See id.* There is no evidence in the record detailing what actions Appellants undertook to obtain information that would have been contained in the documents from any other source—be it from the individuals who would received the letters, third parties, or otherwise. *See id.*

Highlighting the importance of a preservation letter (or otherwise specifically requesting those documents), Mr. VanHook’s testimony showed that he was unfamiliar with class actions and believed that he preserved what he was required to preserve. *See id.* Mr. VanHook testified that he genuinely believed he complied by retaining Mr. Delaney’s documents. *See id.* There is no evidence to suggest that FFC knew the documents needed to be preserved but chose not to do so. *See id.* Thus, Appellants failed to show any level of willful or bad faith action by FFC, or any callous disregard of the rights of Appellants. *See id.*

Finally, Appellants failed to show any prejudice. *See id.* Appellants’ allegations of prejudice rest ultimately on the fact that FFC is unable to provide the notice forms to Appellants; however, the form language did not change between individuals—the notice forms that Appellants are in possession of represent the notices used during the time-period. *See id.* This has not been disputed by FFC. Furthermore, there is no evidence in the record that would suggest that the individuals who received the notices cannot be located.¹³ In fact, the only evidence in the record supports the proposition that these individuals (and thus the Records, to the extent necessary) *can be located*: the affidavits and intervention of Alston and McGuiggan demonstrate this fact. *See id.* Absent class members who need to be identified are, by Appellants’ own admission, not abnormal. (February 19, 2026, Hearing Tr. 13:21-25). These absent class members would also need to be contacted as part of the class action litigation process. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 458, 661 S.E.2d 81, 90 (2008)(“The specific grants of power in Rule 23(d), SCRCP are directed towards notifying the absent parties of the pending litigation.”) (quoting *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992)); *see also id.* at 460, 661 S.E.2d 91 (adopting “opt-out” class action and notification procedure as the exclusive method of class action litigation). Appellants have shown no evidence that this will be any more expensive or difficult without these Records. *See id.*

While Appellants also attempt to downplay the importance of this Court’s grant of remittitur, it is a basis for the circuit court to have denied Appellants’ Motion. Delaney’s Complaint was dismissed before the class was certified. This Court affirmed the dismissal and sent remittitur to the circuit court on October 19, 2016. (October 19, 2016, Remittitur). The Court did not recall

¹³ Appellants have had years to attempt to locate these individuals. It is unclear what, if any, actions Appellants have actually taken to do so; however, any failure of Appellants to do so with the knowledge that FFC did not maintain the records should not be held against FFC.

remittitur until November 2, 2016. (November 2, 2016, Recall of Remittitur). Appellants argue that FFC has never taken the position that Records were destroyed during this time period; however, this is factually incorrect and impermissibly shifts the burden to FFC. *See Welch*, 445 S.C. at 655, 916 S.E.2d at 328 (holding that the court must consider the nature of the discovery refused, the discovery stage of the case, willfulness, and prejudice); *Karppi*, 327 S.C. at 542, 489 S.E.2d at 681 (Ct. App. 1997) (stating the burden is upon the party appealing from the order to demonstrate the trial court abused its discretion). It is Appellants' burden to show that the Records were not destroyed during this time-period, not FFC's burden to show that the Records were destroyed during this time period. Even if it were FFC's burden, Mr. VanHook explicitly referenced dismissal of the claim in his testimony when specifically asked about his understanding of what Records needed to be maintained: "We kept them [the Records] according to the -- like I said, the statute we operated under and then it [the case] went on into a dismissal[.]" (2021 VanHook Depo Tr. 24:4-8). Mr. VanHook's testimony can reasonably be understood as noting that Records were destroyed during the time period in which the case was dismissed as a matter of law and prior to this Court's recall of remittitur.

For these reasons, the decision of the circuit court should be affirmed.

B. Even if South Carolina law does not control, Appellants failed to show that sanctions would be appropriate under Federal law.

The federal standard relied on by Appellants requires showing three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Hawkins v. Coll. of Charleston*, No. 2:12-CV-384-DCN, 2013 WL 6050324, at *2 (D.S.C. Nov. 15, 2013). "[A] court must find some degree of fault

to impose sanctions.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). “Moreover, spoliation does not result merely from the ‘negligent loss or destruction of evidence.’” *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013) (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)). “Rather, the alleged destroyer must have known that the evidence was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction.” *Id.*

“When reviewing a district court’s ruling on a plaintiff’s request for a spoliation inference, even on a grant of summary judgment, we have held that the district court’s ruling ‘must stand unless it was an abuse of the district court’s ‘broad discretion’ in this regard.’” *Turner v. United States*, 736 F.3d 274, 281–82 (4th Cir. 2013). Appellants bear the burden of establishing spoliation. *See id.* (holding that Turner, as the party disputing the ruling, bore the burden of establishing spoliation).

i. FFC had no duty or notice to maintain or preserve the Records.¹⁴

Appellants never, at any point in time, specifically requested the preservation of any records. *See Turner*, 736 F.3d at 281–82; *Silvestri*, 271 F.3d at 590; *Hawkins*, 2013 WL 6050324, at *2. Furthermore, Appellants never asked for the production of records other than those of Delaney himself. *See Turner*, 736 F.3d at 281–82; *Silvestri*, 271 F.3d at 590; *Hawkins*, 2013 WL 6050324, at *2. Mr. VanHook’s testimony reflects that Mr. VanHook did not understand what the purported class action complaint entailed, underscoring the important job of a preservation letter. *See Turner*, 736 F.3d at 281–82; *Silvestri*, 271 F.3d at 590; *Hawkins*, 2013 WL 6050324, at *2. Mr. VanHook saw Delaney, the named plaintiff, and requests for Delaney’s documents, and instituted a hold for Delaney’s documents. Mr. VanHook believed that he had complied with all

¹⁴ Contrary to Appellants’ assertion that “no reasonable dispute exists as to any of the three elements required for sanctions.”

that was required of him. For this reason alone, there can be no spoliation under Federal law. *See Turner*, 736 F.3d at 282 (“[T]he alleged destroyer *must have known that the evidence was relevant to some issue*[.] (emphasis added)).

Furthermore, Appellants’ claim was not certified as a class action until nearly a decade after the service of the original Complaint. *See Turner*, 736 F.3d at 281–82; *Silvestri*, 271 F.3d at 590; *Hawkins*, 2013 WL 6050324, at *2. Also, this case was *fully dismissed*—following proper remittitur having been sent from this Court following this Court’s Opinion affirming the circuit court’s dismissal—for a period of time.¹⁵ This creates a time period in which FFC could not have been said to have any duty to maintain the Records—the case was dismissed, in full, upon issuance of the remittitur. *See Stogsdill v. S.C. Dep’t of Health & Hum. Servs.*, 415 S.C. 568, 569, 784 S.E.2d 669, 670 (2016) (“The sending of the remittitur ended appellate jurisdiction over this case, and no further motions will be entertained after the remittitur is sent.”).

When the case was fully dismissed, any duty that FFC may have had no longer applied. Mr. VanHook’s testimony notes that he was keenly aware of the dismissal. When questioned regarding his understanding, he specifically stated that he kept Records pursuant to the statutes and then “the case went into dismissal.” (2021 VanHook Depo. Tr. 24:4-8). FFC had no duty once the case was fully dismissed, and it would be improper to sanction Appellant for destroying Records during the time period in which this case was dismissed. Just as Delaney could not complain if FFC had destroyed the Records in issue when the remittitur was sent down, Delaney cannot complain about FFC not having the Records once the remittitur was (erroneously) recalled. This is somewhat analogous to the severance of the chain of causation by intervening events. In other words, because FFC was under no obligation to maintain the Records as of the issuance of

¹⁵ FFC has similarly challenged the recall of remittitur in its appeal.

the remittitur on October 19, 2016, any obligation that FFC may have had to maintain them prior to October 19, 2016, is mooted. Or to put it yet another way, even assuming, *arguendo*, FFC was required to have the Records on October 18, 2016, the intervening event on October 19, 2016 (the issuance of the remittitur) supersedes Mr. Delaney's complaint that FFC did not maintain the Records thereafter. Indeed, as discussed in FFC's Appellant's brief, the proper issuance of the remittitur ended jurisdiction to disrupt the affirmed dismissal, and the improper recall of the remittitur cannot be said to have revived such jurisdiction.

For these reasons, FFC had no duty to preserve the Records, and this Court should affirm the judgment of the circuit court.

ii. Even if FFC had a duty to preserve the Records, Appellants have not shown that the Records were destroyed with a culpable state of mind.

Appellants must show that the Records were destroyed with some culpable state of mind. *Hawkins v. Coll. of Charleston*, No. 2:12-CV-384-DCN, 2013 WL 6050324, at *2. The “district court must find some degree of fault before imposing sanctions.” *King v. Am. Power Conversion Corp.*, 181 F. App’x 373, 377 (4th Cir. 2006). However, while the Fourth Circuit held that an adverse inference against a party can be drawn against a party who “fails to preserve . . . evidence[;]” such inference “cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting *Vodusek*, 71 F.3d 148 at 156).

Appellants have not shown that FFC destroyed the Records with any culpable state of mind. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2. Mr. Van Hook testified repeatedly that he kept the documents he believed he needed to keep and the rest were destroyed

pursuant to normal business practices. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2. It is clear from Mr. Van Hook's testimony that FFC did not intend to deprive Appellants of the Records. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2. Furthermore, the lack of any preservation from Appellants or request for production of documents specifically requesting other individuals files, on their own, prevent any conduct of FFC from reaching the required culpable mental state. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2. Mr. Van Hook's testimony further evidences the lack of any required mental state: Mr. Van Hook believed he had preserved all the documents necessary. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2.

Furthermore, there is no evidence in the record regarding the specific timing of the destruction of any Records. This matter was dismissed, and Mr. Van Hook's testimony shows that he believed this matter to be dismissed, fully. The Records could have been destroyed during the period in which this matter was fully dismissed and before remittitur was recalled by this Court—Appellants have failed to show that this did not happen. This is a reasonable explanation for the missing paper Records, and one that Appellants cannot overcome. *See Hodge*, 360 F.3d at 450; *Hawkins*, 2013 WL 6050324, at *2.

For these reasons, Appellants have failed to show that the Records were destroyed with any culpable state of mind, and this Court should affirm the decision of the circuit court.

iii. The Records are not relevant to Appellants' claims or defenses such that a reasonable trier of fact could find that it would support the claim or defense, and there has been no prejudice to Appellants.

The Records would not support the claims or defenses and thus are not relevant to Appellants' claims and Appellants have suffered no prejudice. *See Hawkins*, 2013 WL 6050324, at *3-4. There is no dispute regarding the Pre- and Post-Sale Notice forms, and thus the Records

would not support the claims of Appellants. Based on documents already produced by the parties, both the Original Pre- and Post Sale Notices and Modified Pre- and Post-Sale Notices have been located and can be litigated. *See id.* Each notice that Appellants allege was improper was sent to an individual who would have the same access to that document that FFC would have. *See id.* Furthermore, Appellants' argument that there is no way to locate the remaining class members is misguided, as there is absolutely no evidence that the absent/potentially affected class members cannot be located. *See id.* Appellants recitation of the testimony of Mr. VanHook is incorrect. Mr. VanHook only testified that *he* was unable to identify potentially affected class members—not that class members cannot be identified. (2024 VanHook Tr. 88:6-89:10). Every loan made by FFC included an individual on the other side who would have the knowledge that FFC made a loan to them and/or that FFC sent certain notices to that individual. The parties have not undergone any formal class member notification process, so it is unclear what, if any, impact there will be. Appellants acknowledge that situations where class actions are missing the identification of class members “happens a lot” and even gave an example that “if there’s a class action against Samsung for defective TVs, Samsung doesn’t have a list of everybody that bought their TVs. They’re sold all over the country[.]” (February 19, 2026, Hearing Tr. 13:21-25).

Furthermore, and most importantly, Appellants have *actually located two now co-class representatives who fell into the operative time period*. Paul McGuiggan, Jr. and Alicia Alston both stated in their sworn affidavits that they purchased a vehicle and were given a loan by FFC in 2009 and 2010, respectively. Thus, it is clear that Appellants nevertheless have the means and ability to locate the potentially affected class members. At the very least, Appellants have known about the missing Records since 2021, if not earlier. With this knowledge, Appellants did nothing aside from locating McGuiggan and Alston. Appellant waited years to press the issue with the

Court, withdrawing or continuing the motion multiple times, including after argument on the motion occurred, rather than proactively attempting to limit any prejudice that would have resulted from the lack of the Records.

C. Appellants failed to adequately articulate the requested sanctions, and the sanctions requested were not proportional.

Both South Carolina and Federal courts examine proportionality of sanctions. *See Griffin Grading & Clearing, Inc.*, 334 S.C. at 198, 511 S.E.2d at 719 (“[T]he sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits.”); *Orlando*, 320 S.C. at 511, 466 S.E.2d at 355 (“Where the effect [of the sanctions] will be the same as granting judgment by default or dismissal,” such sanctions may be imposed “only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.”); *Skywaves I Corp.*, 423 S.C. at 457, 814 S.E.2d at 657 (“Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction.”); *QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547 (“When a sanction “would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.”); *King*, 181 F. App'x at 376 (“We have prescribed the following approach for district courts considering dismissal as a sanction for a given instance of spoliation: dismissal is appropriate only if “either (1) ... the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) ... the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.”); *Silvestri*, 271 F.3d at 593 (setting forth the requirements to justify the “harsh sanction of dismissal[.]”).

Even if the Court disagrees with FFC, the relief requested was not proportional—either

when relying on the federal or state standard. It remains rather unclear what, specifically, Appellants requested the circuit court actually do. Even when directly asked by the circuit court for the specific sanction that Appellants wanted the circuit court to enter, Appellants continued to list a range of possibilities rather than directly stating the specific sanction that Appellants desired—which Appellants continue to do in their initial brief.¹⁶

In their memorandum in support, Appellants appear to only request the striking of FFC’s answer. (November 5, 2024, Memorandum in Support at 5).¹⁷ However, during the hearing on their motion, Appellants argued for the following possibilities:¹⁸ (1) an order finding that FFC had a duty to preserve the Records and failed to do so; (2) submit a proposal from a class-action notice professional; (3) “have a little bit of time to prepare an attorney’s fee affidavit for all of the fees and costs dedicated to this[;]” (4) the striking of FFC’s answer in full; (5) allow Appellants time to “come up with a proposal for how we think [the circuit court] should order damages for this group.” (January 9, 2026, Hearing Tr. 92:7-95:19). Appellants did not file any proposal, and the circuit court’s denial of their Motion for Sanctions followed.

During the hearing on Appellants’ motion to reconsider the denial of their motion for sanctions, when asked *again* by the circuit court what sanction Appellants were requesting, Appellants stated only that “[w]hat I want is I want the opportunity to file a written plan that [FFC has] the opportunity to look at, that they have the opportunity to file objections to.” (February 19, 2026, Hearing Tr. 22:15-17). The circuit court again asked Appellants for a concrete plan: “I understand that you then put the order denying any sanction with -- it looks to me like “any” is in

¹⁶ Regardless, FFC believes that even if this Court believes sanctions were appropriate, FFC believes the circuit court would be the appropriate court to determine any specific sanctions.

¹⁷ Appellants’ August 6, 2024, Motion for Sanctions does not list any specific requested sanction.

¹⁸ It is not clear whether Appellant was requesting *all* of the items listed, a combination of *some* of the items listed, or only *one* of the items listed.

italics. And so here I am today asking, I want to know what you want. And what you want to do is, you're not prepared to answer that today. You want to give me a proposal of ideas. Is that right?" (February 19, 2026, Hearing Tr. 23:1-6). Appellants still failed to articulate any actual remedy, stating: "I believe the fairest and the most defensible and appropriate way to handle this is for us to file a document that they will have the opportunity to object to . . . and then for the Court to decide if there's going to be remedial sanction, whether or not what we're asking for is fair and reasonable or is it out of left field." (*id.* at 23:12-15; 23:22-24:5). The court responded: "I don't understand why you didn't bring the plan today. I mean, why we gotta come back again to argue a motion if I decide -- I don't understand that. But go ahead." (*id.* at 24:6-9). Appellants, in the acknowledged that they *already stated* that they would file a "plan" at the prior hearing and had failed to do so to this point, stating: "[a]nd if Your honor wants . . . us to file a plan -- we asked at the last hearing for the opportunity to do that. And if we should've already done it and gone ahead and done it, that's on me." (*Id.* at 24:20-23). Appellants did not file a plan. In their Initial Brief, Appellants continued to present an array of options of potential sanctions, some with more detail than others.¹⁹

Appellants' refusal to take a concrete position on the specific sanction that Appellants want the court to enter not only hamstring FFC's ability to defend against the motion, as proportionality of an amorphous sanction cannot be judged, and forces FFC to defend itself from the threat of any possible sanction under the sun, but also gave the circuit court a reasonable ground to deny Appellants' motion. It is axiomatic that the party requesting sanctions needs to clearly indicate to the court what sanctions it is requesting for the court to be able to grant the requested sanctions.

¹⁹ While Appellants detail a proposal regarding presentation of statistical evidence or utilizing a class administration firm specialist, Appellants only say that there should be some punitive sanction in addition to the other possible sanctions without any analysis therein. (Appellants' Initial Brief at pp.28-29).

Furthermore, by Appellants' own admission, the Records only represent "just a small part, a small group here, that we don't have data for." (February 19, 2026, Hearing Tr. 8:15-17).

There can be no reasonable argument that FFC was willfully disobedient—FFC never refused to turn over documents or information that were in its possession, nor had it been specifically ordered to preserve or maintain any documents. *See Orlando*, 320 S.C. at 511, 466 S.E.2d at 355; *QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547. Similarly, there is no evidence in the record that FFC acted in bad faith or gross indifference to the rights of Appellants. *See QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547. The testimony of Mr. VanHook establishes only that Mr. VanHook believed he was complying with what was required—not that FFC knew it needed to maintain the Records and destroyed them anyways. *See QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547. Thus, the possibility of striking FFC's answer, or other sanctions that would have a similar effect, are foreclosed. *See Orlando*, 320 S.C. at 511, 466 S.E.2d at 355. Even if this option were not completely foreclosed by the lack of willful or bad faith spoliation, the striking of FFC's *entire answer* due to conduct that affected *only a small part of the class* would be the same hydrogen bomb that was dropped in *Balloon Plantation*. *See Balloon Plantation*, 303 S.C. at 154, 399 S.E.2d at 440 ("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. In the instant case, the sanction was a hydrogen bomb. The defendants were denied the opportunity to present a defense.").

Furthermore, the time period advanced by Appellants fails to consider the document retention policy of FFC compared to the operative date. Even if the earliest possible date is used and, assuming arguendo, that the operative date was service of the Complaint, as asserted by Plaintiff, the time period advanced includes time in which FFC could have disposed of Records pursuant to its document policy prior to service of the Complaint. Service was accomplished on

October 11, 2011; thus, any documents which were older than 26-months on that should not be counted against FFC. In other words, records from October 2008 through August 12, 2009, should not be included in any calculation.²⁰ Appellants have no evidence regarding which Records were or were not maintained past the document retention policy and thus are unable meet their burden in establishing that FFC maintained documents past their retention policy.

Furthermore, the shotgun blast of sanctions proposed by Appellants failed to also consider any prejudice that has resulted from Appellants' own failure to proactively attempt to remedy any prejudice and instead choosing to wait seven years before pushing the issue. *See Orlando*, 320 S.C. at 511, 466 S.E.2d at 355 ("Where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party." (quoting *Baughman*, 306 S.C. at 108, 410 S.E.2d 537)); *id.* ("A sanction of dismissal is too severe if there is no evidence of any intentional misconduct."); *Balloon Plantation*, 303 S.C. at 154, 399 S.E.2d at 440 (holding the sanction of holding defendants in default and striking their counterclaim was unduly harsh under the circumstances, and stating "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"); *see also Hawkins*, No. 2:12-CV-384-DCN, 2013 WL 6050324, at *8 ("[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." (quoting *West*, 167 F.3d at 779)). Indeed, Federal Courts have acknowledged the need for parties to timely file and resolve a spoliation motion:

The lesson to be learned from the cases that have sought to define when a spoliation motion should be filed in order to be timely is that there is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact

²⁰ August 11, 2009, is not included as there is no indication as to what time service was completed. Thus, records could have already been destroyed on this day prior to the actual accomplishment of service.

intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved.

Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 508 (D. Md. 2009); *see also id.* (“Courts are justifiably unsympathetic to litigants who, because of inattention, neglect, or purposeful delay aimed at achieving an unwarranted tactical advantage, attempt to reargue a substantive issue already ruled on by the court through the guise of a spoliation motion, or use such a motion to try to reopen or prolong discovery beyond the time allotted in the pretrial order.”).

Appellants argued that they knew that FFC did not have access to the documents for the remaining class members since at least the 2021 deposition of Mr. VanHook. Instead of proactively attempting to lessen any prejudice that might have been suffered, Appellants waited years after learning that the Records were no longer in FFC’s possession and continue to obfuscate what sanction(s) they actually want to be awarded. The various items proposed by Appellants—striking the answer *in full*; having FFC pay, *in full*, for the costs of locating/notifying class members, which would already have to be done²¹; pay attorneys’ fees; order damages (when other damages have not even been established); and potentially more (as Appellants never concretely stated what specific sanctions they wanted), would require evidence of bad faith and intentional conduct—which is notably absent—and go well beyond “the necessities of the situation to foreclose a decision on the merits of a case” and are not “molded to serve the prophylactic, punitive, [or] remedial rationales underlying the spoliation doctrine.” *See Balloon Plantation*, 303 S.C. at 154,

²¹ “The specific grants of power in Rule 23(d), SCRCP are directed towards notifying the absent parties of the pending litigation.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 458, 661 S.E.2d 81, 90 (2008) (quoting *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992)); *see also id.* at 460, 661 S.E.2d at 91 (adopting “opt-out” class action and notification procedure as the exclusive method of class action litigation).

399 S.E.2d at 440; *QZO, Inc.*, 358 S.C. at 257-58, 594 S.E.2d at 548 (approving the striking of pleadings where the appellant intentionally violated a TRO and formatted his computer hard-drive, erasing all evidence inside); *Hawkins*, 2013 WL 6050324, at *8; Rule 23(d), SCRCP off. Cmt. (“This Rule requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action.”).

The record provides ample justification for the circuit court’s exercise of discretion to find that no sanctions were warranted under the circumstances.

CONCLUSION

For the reasons stated, this Court should affirm the circuit court’s orders.

This 12th day of October, 2026.

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v.

First Financial of Charleston, Inc., Appellant/Respondent,

AND

Otha Delaney, Octavia D. Watson, Alicia S. Alson and Paul D. McGuiggan, Jr.,
individually and on behalf of all others similarly situated as Co-Class
Representatives, Appellants,

v.

First Financial of Charleston, Inc., Appellant/Respondent.

Appellate Case No. 2026-000244

The Honorable Deadra L. Jefferson,
The Honorable Robert J. Bonds
Charleston County
Trial Court Case No. 2011CP1007166

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