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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2026-002279
Circuit Court Case No. 2025-CP-40-04961

Richard E. Robinson, ... Plaintiff,

v.

3M Company f/k/a Minnesota Mining and Manufacturing Company; 4520 Corp., Inc.; AO Smith Corporation; ABB Inc.; Abex Corporation; AECOM Energy & Construction, Inc.; Air & Liquid Systems Corporation; Alfa Laval Inc.; Amentum Environment & Energy Inc.; American Steel & Wire Company; Ameron International Corporation; Anchor Darling Valve Company; Aqua-Chem Inc.; Armstrong International Inc.; Atlas Asbestos Company Ltd.; Atlas Turner Inc.; Atwood & Morrill Co. Inc.; Babcock Borsig Power Inc.; Bahnson Inc.; Beaty Investments Inc.; Bell & Gossett Company; Bendix; Benjamin F. Shaw Company; Bonitz Company; Bonitz Insulation Company; Brand Insulation Inc.; Buffalo Forge Company; Buffalo Pumps Inc.; Burnham Commercial; Burnham Corporation; Burnham LLC; BWIP Inc.; CR Hipp Construction Inc.; Canvas CT LLC; Canvas MW LLC; Canvas SX LLC; Carboline Company; Carolina Industrial Insulating Co.; Carrier Corporation; Carver Pump Company; CBS Corporation a Delaware Corporation; CBS Corporation a Pennsylvania Corporation; Celanese Corporation; CIRCOR Instrumentation Technologies Inc.; Clean Harbors Industrial Services Inc.; Cleaver-Brooks Division; Cleaver-Brooks Inc.; Clyde Union Inc.; CNA Holdings LLC; Compudyne Corporation; Compudyne LLC; Cooper Industries LLC; Copeland Corporation LLC; Copes-Vulcan; Copes-Vulcan Inc.; Covil Corporation; Crane Co.; Crane Instrumentation & Sampling Inc.; Crane Instrumentation & Sampling PFT Corp.; Crosby Valve LLC; Crown Boiler Co.; Crown Boiler Co. LLC; CRSS Inc.; CSK Auto Inc.; Daniel International Corporation; Davis Mechanical Contractors Inc.; DB Riley Inc.; DCO LLC; Dean Pump Division; Dezurik Inc.; Durez Corporation; EI Du Pont De Nemours and Company; Eaton Corporation; Ecodyne Corporation; Edward Valves Inc.; EIDP Inc.; Electrolux Home Products Inc.; Electrolux Home Products LLC;

Erie City Iron Works; Fiber Insulation Inc.; Fisher Controls International LLC; Flowserve Corporation; Flowserve US Company; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International Inc.; Fluor Corporation; Fluor Daniel Services Corporation; Fluor Enterprises Inc.; FMC Corporation; Foster Wheeler Energy Corporation; G Denver and Co LLC; Gardner Denver Inc.; Gardner Denver Industrial Machinery; Gardner Denver Nash LLC; General Boiler Casing Company Inc.; General Dynamics Corporation; General Electric Company; Genuine Parts Company; Goodyear Tire & Rubber Company; Gorman-Rupp Company; Gould Electronics Inc.; Goulds Pumps Inc.; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell Corporation; Grinnell LLC; Griscom-Russell Company; Guy M Beaty & Co.; Heat & Frost Insulation Company Inc.; Henry Pratt Company LLC; Hoffman Specialty Mfg. Corp.; Hoke Inc.; Hollingsworth & Vose Company; Honeywell International Inc.; Howden Buffalo Inc.; HPC Industrial Services LLC; IMO Industries Inc.; Impac Inc.; International Paper Company; ITE Circuit Breaker Co.; ITT Corporation; ITT Fluid Products Corp.; ITT Industries Inc.; ITT LLC; ITT Marlow; J & L Insulation Inc.; K-Mac Services Inc.; Kennedy Valve Company; Kennedy Valve Division; Kirby-Cundiff Insulation and Firestop of Virginia; Kirby-Vass Insulation Inc.; Kragen Auto Supply Co.; Marley Cooling Tower Company; McCord Corporation; McWane Inc.; Met-Pro Technologies LLC; MetLife Inc.; Metropolitan Life Insurance Company; Micheline Corporation; Micheline North America Inc.; Micheline Tire Corporation; Minnesota Mining and Manufacturing Company; Mueller Co. LLC; NAPA; National Automotive Parts Associates; Nibco Inc.; O'Reilly Auto Enterprises LLC; O'Reilly Automative Stores Inc.; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Peerless Pump; Pfizer Inc.; Piedmont Insulation Inc.; Pipe & Boiler Insulation Inc.; Plastics Engineering Company; Plenco; Pneumo Abex LLC; Presnell Insulation Co. Inc.; Pursuit Attractions and Hospitality Inc.; Redco Corporation; Rentavla LLC; Riley Power Inc.; Riley Stoker Corporation; Rust Engineering & Construction Inc.; Rust International Inc.; Schneider Electric USA Inc.; Sherwin-Williams Company; Siemens Energy & Automation Inc.; Siemens Industry Inc.; Sirrine Environmental Consultants Inc.; Spirax Sarco Inc.; SPX Cooling Technologies LLC; SPX LLC; Square D. Company; Standard Insulating Company Inc.; Standard Insulation Company of NC Inc.; Starr Davis Company Inc.; Star Davis Company of SC Inc.; Sterling Gludi Systems USA LLC; Sterling Wander LLP; Taco Inc.; The Dial Corporation; The Duriron Company, Inc.; The Marley-Wylain Company LLC; TopBuild Corp.; Union Carbide Corporation; Union Pump Company; Uniroyal Holding Inc.; United Conveyor

Corporation; United States Steel Corporation; United Subcontractors Inc.; US Rubber Company Inc.; Valves and Controls US Inc.; Velan Valve Corp.; Viacom Inc.; Viad Corp.; Victor Gasket Manufacturing Company; Viking Pump Inc.; Walworth Company; Warren Pumps LLC; Watts Regulators Co.; Watts Water Technologies Inc.; Weil-McLain; Weir Valves & Controls USA Inc.; Westinghouse Electric Corporation; William Powell Company; Wind Up Ltd.; Yeargin Construction Company Inc.; York International Corporation; York-Shipley Inc.; Zurn Industries Inc.; Zurn Industries LLC, ...

Defendants,

of which

TopBuild Corporation is the..... Appellant.

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QUESTIONS PRESENTED

1. Section 14-3-330(2)(c) of the South Carolina Code makes an order striking a pleading immediately appealable when it affects a substantial right, and appealability turns on the order's effect, not its label. The Sanctions Order directs the jury to presume that Standard exposed Robinson to asbestos and bars TopBuild from offering any evidence to the contrary, removing the defenses TopBuild has raised from the outset. Is the Sanctions Order immediately appealable?
2. Rule 37(b)(2), SCRCP, authorizes sanctions against a party that "fails to obey an order to provide or permit discovery." No order compelling discovery preceded the Sanctions Order, which was the first to compel any discovery from Standard. May the Sanctions Order impose Rule 37(b)(2) sanctions when Standard disobeyed no discovery order?
3. Rule 37(b)(2) empowers "the court in which the action is pending" to sanction a party's discovery failure in "the action" before it. The Sanctions Order rests on testimony Standard gave years earlier in other lawsuits, not on any discovery failure in this case. May the Sanctions Order impose Rule 37(b)(2) sanctions for testimony in other cases?

INTRODUCTION

Before the jury hears a word of this case, the August 21, 2026 order (the Sanctions Order) has decided its central dispute against TopBuild Corporation (TopBuild). To prevail, Richard E. Robinson must prove that he was exposed to asbestos by TopBuild's predecessor, Standard Insulating Company, Inc. (Standard). The Sanctions Order supplies that fact by presumption—a fact the record does not establish—and bars TopBuild from offering anything to the contrary. Two defenses TopBuild has raised since its first responsive pleading are, in practical terms, already lost.

Robinson spent his career insulating pipes at industrial plants, and he sued many companies for asbestos exposure, TopBuild among them. By his own account, he had never heard of Standard and could not place it at any site where he worked. Standard was primarily a residential insulation business. In earlier asbestos cases, Standard's corporate representative, Fredrick Judson, described Standard's operations. During his deposition in this case, when Judson was shown documents from another case revealing inconsistencies in his prior testimony, he corrected that testimony. Even so, nothing tied Standard to any site where Robinson worked. The Sanctions Order followed.

TopBuild does not defend the earlier testimony, and it does not ask this Court to decide whether the testimony was accurate. Its question is a narrow legal one. A court's power to sanction discovery abuse comes from the discovery rules and reaches only as far as they allow. The more drastic the sanction, the more that matters, and few sanctions are more drastic than one that decides the case. Yet the rule the Sanctions Order rests on does not authorize the sanctions imposed here.

That follows from two features of the rule, either of which is enough to reverse. Rule 37(b)(2), SCRCP, permits sanctions against a party for disobeying an order to provide discovery. No such order was ever entered against Standard. In fact, the Sanctions Order is the first to require anything of it. The rule also reaches a party's conduct in the discovery before the court, not what

a witness swore years earlier in other cases, which is where the testimony behind these sanctions was given. A sanction that satisfies neither condition is not a discretionary judgment to which this Court defers. It is contrary to law.

That the Sanctions Order decides so much is also what makes it reviewable now. By presuming Robinson's exposure and forbidding TopBuild to contest it, the Sanctions Order takes the dispositive questions from the jury before any evidence is heard and places them beyond the reach of an appeal from final judgment. The Sanctions Order is appealable, and because it rests on a rule whose conditions were not met, this Court should reverse.

STATEMENT OF THE CASE

This appeal is from an order imposing discovery sanctions in an asbestos personal-injury case. **R. ___; Sanctions Order 18–19.** Robinson sued TopBuild as the corporate successor to Standard, along with dozens of other defendants. **R. ___; Amend. Comp. 15–19.** Resting on testimony that Standard's corporate representative gave about Standard's historical business, the Sanctions Order directs the jury to presume that Robinson was exposed to asbestos insulation Standard supplied, installed, or removed, and bars TopBuild from offering any evidence that he was not. **R. ___; Sanctions Order 18–19.** The factual background and procedural history follow.

I. Factual Background

a. Standard Installed Insulation, and Its Core Business Was Residential

Standard was founded in Charlotte, North Carolina, in 1945 and incorporated around 1956. **R. ___; Sanctions Order 3.** Over the following decades it grew into one of the largest residential insulation and light commercial firms in the Charlotte area, performing work across the Southeast, including South Carolina, North Carolina, Florida, Georgia, Virginia, and Kentucky. **R. ___; Sanctions Order 3.** In 1998, Standard merged with other insulation companies to become United

Subcontractors, Inc. (United), and in 2018 TopBuild acquired United. **R. ___; Sanctions Order 3.** Judson, the son of Standard's founder, worked for the company from boyhood, bought it in 1978, and served as its president and, later, as its corporate representative. **R. ___; Sanctions Order 5.** Standard kept business records under a retention policy of five to seven years, and it ceased independent operations after the 1998 merger. **R. ___; Judson 9.24.21 Depo. 50:11–25; TopBuild Resp. 4–5.**

The materials Standard installed in homes did not contain asbestos; Judson described a blown-in product used "for residential applications" and the fiberglass that later displaced it. **R. ___; Judson 5.21.26 Depo. 133:13–22, 140:9–16; Judson 7.14.26 Depo. 18:14–16, 70:4–11.** When Standard installed insulation outside North Carolina, including in South Carolina, those projects were primarily "military housing, residential housing." **R. ___; Judson 7.14.26 Depo. 73:5–10.** Standard also did some commercial work, and it ran a division that sprayed insulation and acoustical finishes onto buildings, work Judson called "spray-back." **R. ___; Judson 7.14.26 Depo. 18:17–19:10, 45:20–46:4, 68:8–12.**

b. When Standard Worked With Asbestos, It Removed the Material Under Regulated Abatement to Obtain the Spray-Back That Followed

Judson testified that Standard explored asbestos abatement during the 1980s and 1990s. **R. ___; Judson 7.14.26 Depo. 18:6–19:11, 45:20–46:4.** Standard's interest in that work was the spray-back that followed it; its "primary objective," Judson explained, was "to incorporate what's called spray-back," the spraying of new, non-asbestos insulation onto a building once the old material had been removed and the site cleared and certified. **R. ___; Judson 7.14.26 Depo. 18:19–19:10, 68:8–12.** Standard subcontracted much of the removal to others and performed the spray-back itself. **R. ___; Judson 7.14.26 Depo. 49:19–25.** When it did the removal itself, it was done through two subsidiaries, Standard Specialty Contractors and Standard Environmental. **R.**

___; Judson 7.14.26 Depo. 45:20–46:4, 49:19–25. This work, Judson testified, was removal, not installation, and Standard "did not install any asbestos-containing products on industrial sites." **R. ___; Judson 7.14.26 Depo. 99:16–19, 100:9–12.**

c. Robinson Installed Pipe Insulation at Industrial Plants, Stripping It Only to Re-Cover

Robinson worked as an insulator and asbestos worker for mechanical contractors at plants and other industrial facilities across the Carolinas, among them Hillcrest Hospital, the Skyland powerhouse, Buffalo Mill, Clark Schwebel, Clemson University, and the Celanese plant in Spartanburg. **R. ___; TopBuild Resp. 7–8.** Much of that work was new construction or maintenance, installing new, or replacing old, insulation on pipes, steam lines, and vessels. **R. ___; Robinson Depo. 49–54.** When Robinson removed insulation, he did so to re-cover the same equipment with new material. Where a vessel's covering was "tore half off," he would "straighten it out and apply new," and where he had to strip a line, he would "[c]ut the wires, the bands, and tear it off" before applying the new insulation. **R. ___; Robinson Depo. 97:24–98:22.** In the 1980s, Robinson also spent time in the logging business, buying and cutting timber. **R. ___; Robinson Depo. 101:4–15.**

Robinson testified that he had never heard of Standard, United, or TopBuild, could not say he worked at any jobsite where any of them were present, and could not say he had been exposed to asbestos by any of them or their products. **R. ___; Robinson Depo. 266–69.** Of Standard, he testified, "I don't know them. I don't even know where they are from." **R. ___; Robinson Depo. 267:8–9.**

d. Standard's Representatives Were Deposed in Earlier Asbestos Cases

Standard was named as a defendant in several earlier asbestos cases, including *Murphy*, *Carpenter*, and *Wannamaker*, filed between 2020 and 2021.[1] **R. ___; Sanctions Order 1–2.** Standard produced two corporate representatives for depositions in those cases, Jay Fleet and Judson. **R. ___; Sanctions Order 2.** In those depositions the representatives testified that Standard was a residential insulation company whose work did not involve asbestos and that Standard had not performed industrial insulation work or asbestos abatement. **R. ___; Sanctions Order 2.** As to Duke Power, Judson testified that Standard had done non-asbestos insulation work for Duke properties, including insulating a Duke office building, though he did not recall Standard ever selling insulation materials to Duke. **R. ___; Judson 12.8.21 Depo. 45:15–20.** In connection with those cases, Standard searched for responsive records at its former office, at its successors' locations across four states, and in its successors' electronic systems, and it made Freedom of Information Act (FOIA) requests to North and South Carolina. **R. ___; TopBuild Resp. 3–6, 16–18; Judson 5.21.26 Depo. 117–125.**

e. When Standard Was Deposed Again in This Case, It Produced No New Records

Judson was deposed in this case on May 21, 2026. **R. ___; Sanctions Order 2, 13.** For that deposition, Standard served written discovery responses and produced over 14,000 pages, the records its earlier searches located. **R. ___; Sanctions Order 13; Judson 5.21.26 Depo. 69:4–10.** Standard also searched its successors' electronic records against the name of each jobsite on

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[1] *Murphy v. Covil Corporation, et al.*, C/A No. 2020-CP-40-01364, In the Court of Common Pleas for the 5th Judicial Circuit, County of Richland, South Carolina (*Murphy*); *Carpenter v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-04475, In the Court of Common Pleas for the 5th Judicial Circuit, County of Richland, South Carolina (*Carpenter*); *Wannamaker v. 3M Company, et al.*, C/A No. 2021-CP-38-00240, In the Court of Common Pleas for the 5th Judicial Circuit, County of Richland, South Carolina (*Wannamaker*).

Robinson's list, against roughly thirty additional terms drawn from his work history, and against the term "asbestos." **R. ___; Sanctions Order 14; TopBuild Resp. 4, 16–17.** No new records turned up. **R. ___; Sanctions Order 13; Judson 5.21.26 Depo. 69:4–10.**

f. Shown Documents From Another Case, Judson Corrected His Testimony

Judson's deposition on the noticed topics was suspended, and, because he was already present, TopBuild asked to continue on the narrower subject of Standard's historical operations, with the parties to meet and confer about completing the noticed deposition. **R. ___; Judson 5.21.26 Depo. 69–86.** On that subject, Judson was shown two documents from a third party's production in a different case, a 1974 purchase order for a delivery of insulation to the Duke Power Belews Creek plant and a 1985 notification of asbestos abatement at the Celanese Celriver plant in Rock Hill, about seventy miles from the Celanese plant in Spartanburg where Robinson worked. **R. ___; Sanctions Order 9–10; TopBuild Resp. 8.** Neither document came from Standard's files. **R. ___; Sanctions Order 16.** Shown the documents, Judson acknowledged the Belews Creek delivery and the Celriver abatement and corrected the answers he had given earlier in the deposition. **R. ___; Judson 5.21.26 Depo. 94–104.** He did not resist the documents. Shown the 1974 purchase order, Judson testified that he had "no reason to dispute this document at all," and he agreed that the removal the Celriver notice described was "work." **R. ___; Judson 5.21.26 Depo. 94–104.**

Judson was produced again for the continued deposition on July 14, 2026, where he testified about the extent of Standard's abatement work and its dealings with Duke Power. **R. ___; Judson 7.14.26 Depo. 21–50, 71:5–72:23.** Judson explained that his earlier answers used "work" to mean the installation of asbestos products, and, after "work" was characterized as including regulated removal, he agreed those answers had been inaccurate and said the discrepancy had

troubled him because Standard had in fact performed removal. **R. ___; Judson 7.14.26 Depo. 21–50, 71:5–72:23, 99–100.**

By this point, Standard's searches against the jobsites on Robinson's list had turned up no records. **R. ___; Sanctions Order 13–14; TopBuild Resp. 4, 16–17.** Robinson, too, testified that he never heard of Standard and could not place it at any site where he worked. **R. ___; Robinson Depo. 266–69, 267:8–9.** The two documents presented to Judson at the May deposition concerned a Duke Power plant and a Rock Hill facility, neither among Robinson's worksites. **R. ___; Sanctions Order 9–10; TopBuild Resp. 8.** Even with the additional testimony from Judson and the evidence gathered from third parties, no evidence connected Standard, United, or TopBuild to any site where Robinson worked.

II. Procedural History

a. Robinson Moved to Compel and for Sanctions Presuming Exposure and Precluding Any Defense Evidence

In June 2026, Robinson moved to compel Standard's discovery and for sanctions, citing Rules 26(b), 34, and 37, SCRCP. **R. ___; Robinson Mot. 1.** The motion sought sanctions on the ground that Standard had "willingly and intentionally provided false testimony under oath" in earlier cases about the nature of its business, corrected only through documents another defendant produced in a different case. **R. ___; Robinson Mot. 13–14.** Robinson asked the court to instruct the jury in this case to presume that he "was exposed to asbestos insulation supplied, installed, and/or removed by Standard" during his career, and to prohibit TopBuild from "introducing any opinions, testimony, or evidence suggesting" otherwise. **R. ___; Robinson Mot. 14–17.** The motion did not identify any discovery order that Standard disobeyed. **R. ___; Robinson Mot. 13–17.**

b. TopBuild Responded That No Discovery Order Was Violated and the Sanctions Would Strike Its Defenses

TopBuild opposed the motion on several grounds, three of which are relevant here. First, it argued that Rule 37, SCRCP, did not authorize the requested sanctions, because Standard had not disobeyed any discovery order, the predicate the rule requires, and had in any event participated fully in discovery. **R. ___; TopBuild Resp. 1–2, 14–18.** Second, it contended that any sanction should be measured against "the discovery in this lawsuit," not conduct in other cases. **R. ___; TopBuild Resp. 20–21.** Third, it maintained that the sanctions Robinson sought would strike pleaded defenses, establish exposure and causation before trial, and leave TopBuild unable to defend. **R. ___; TopBuild Resp. 24–25.**

c. The Circuit Court Heard Argument at Two Hearings

The circuit court heard argument on the motion on July 9, 2026. **R. ___; July 9 Hr'g Tr. 1.** TopBuild identified the parts of its pleadings the motion would reach, including affirmative defenses 16, 27, 29, 30, 55, and 62 and roughly two dozen paragraphs of its answer, and argued that the dispute was not the disobedience of a court order. **R. ___; July 9 Hr'g Tr. 15–16.** The circuit court responded that the conduct was "a lot more than" an inconsistency in testimony, said it would "strike the requested portions of [TopBuild's] pleadings," and directed that Judson be re-deposed before trial. **R. ___; July 9 Hr'g Tr. 16–17, 38.** Between these two hearings, as discovery continued, Robinson's counsel noted that a defense expert's opinion no longer mattered because "TopBuild's liability and causation as to Robinson has already been established." **R. ___; Branham Email 1.** The circuit court held a second hearing on July 22, 2026, at which it questioned Judson directly about Standard's abatement work. **R. ___; July 22 Hr'g Tr. 25–53.**

d. The Circuit Court Granted the Motion and Entered the Sanctions Order

The circuit court issued a written order granting Robinson's motion on August 21, 2026. **R. ___; Sanctions Order 1, 18–19.** The Sanctions Order recounted the testimony Standard's representatives gave in the earlier cases, found it false, and concluded that the resulting sanctions were "directly related to the conduct complained of and are the minimum sanctions necessary to undo the harm caused by" Standard's conduct. **R. ___; Sanctions Order 1–14, 18.** The Sanctions Order did not identify any discovery order that Standard disobeyed. **R. ___; Sanctions Order 14–19.** It permitted Robinson to introduce evidence of the prior inconsistent testimony and to ask the jury to draw adverse inferences from it. **R. ___; Sanctions Order 18–19.** The Sanctions Order also directed the jury to presume that Robinson "was exposed to asbestos insulation supplied, installed, and/or removed by Standard . . . during his time as an insulator from 1966–1983," and it barred TopBuild from "introducing any opinions, testimony, or evidence suggesting that it did not sell, install, or remove asbestos-containing insulation at any worksite of [Robinson]." **R. ___; Sanctions Order 19.**

TopBuild appealed the Sanctions Order. **R. ___; Notice of Appeal.** The Court of Appeals then directed the parties to submit memoranda on whether the Sanctions Order is immediately appealable and, after receiving them, allowed the appeal to proceed to full briefing.[2] **R. ___; Ct. App. Order.** This Court then certified the appeal. **R. ___; Cert. Order.**

[2] Though TopBuild's appealability argument was fully briefed in its memorandum to the court of appeals, because the interpretation of a statute is a "question of law that appellate courts review de novo," that argument is raised again herein. *Butts v. Mace*, 448 S.C. 39, 48, 930 S.E.2d 698, 703 (2026).

STANDARD OF REVIEW

This Court reviews an order imposing discovery sanctions for abuse of discretion. *Welch v. Advance Auto Parts, Inc.*, 445 S.C. 640, 650, 916 S.E.2d 320, 325 (2025). It will reverse such sanctions when "no reasonable evidence supports them or they were imposed contrary to the correct law." *Id*.

ARGUMENT

Rule 37, SCRCP, gives a circuit court real power to address discovery abuse. But the rule also fixes the limits of that power. *See* Rule 37(b)(2), SCRCP. A sanction that falls outside those limits is not a matter of discretion. It is an error of law.

Judson acknowledged that some of his answers were inaccurate and corrected them. Whatever the circuit court made of that, and however the conduct is ultimately characterized, the question on appeal is a narrow legal one. A discovery sanction must answer to the rule that authorizes it, and Rule 37(b), SCRCP, does not authorize this sanction. The Sanctions Order is appealable now, and the Court may reach the merits.

I. The Sanctions Order Is Immediately Appealable Under Section 14-3-330(2)(c)

As a threshold matter, the Sanctions Order is immediately appealable under section 14-3-330(2)(c) of the South Carolina Code. A party ordinarily may not appeal until the case is over. *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). That is because most orders entered during a case, discovery orders above all, regulate the litigation without deciding it. *See id.*; *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right."). Section 14-3-330 sets out the exceptions, and subsection (2)(c) governs here.

a. What an Order Does, Not What It Is Called, Decides Its Appealability

Subsection (2)(c) makes immediately appealable an order affecting a substantial right that strikes "an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c). An older decision read that language to reach only an order expressly striking a pleading. *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 317–18, 368 S.E.2d 456, 456 (1988) (holding an order denying a party's Rule 6(b), SCRCP, motion was not immediately appealable under subsection (2)(c) because it did not strike an answer). The cases since have not read it so narrowly. They ask what an order does, not what it is called. *See, e.g., Thornton v. SCE&G*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011) ("We believe a narrow construction of section 14-3-330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it."). An order thus comes within the subsection when it "removes a material issue from the case, [] preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Id.* at 304, 705 S.E.2d at 479. Those two conditions decide this appeal, and the Sanctions Order meets both.

The Sanctions Order issuing under Rule 37 does not place it outside the subsection, because here too effect controls over form. South Carolina's courts have addressed the immediate appealability of Rule 37(b)(2) sanctions under section 14-3-330 only a handful of times, and never in a case like this one. Most discovery orders are interlocutory because they regulate how discovery proceeds and leave the ordered party free to defend on the merits. *Grosshuesch*, 377 S.C. at 30, 659 S.E.2d at 122. A sanction that strikes a defense is different in kind because it decides the case rather than manages it. South Carolina's jurisprudence falls along that line. In *Richardson v. Halcyon Real Estate Services, LLP*, an order that required reconvened depositions, awarded fees, and limited a witness's conduct was not immediately appealable, because it governed the conduct

of discovery and left the defense intact. 439 S.C. 419, 424–27, 887 S.E.2d 153, 155–57 (Ct. App. 2023). In *Jones v. Robinson*, by contrast, the court of appeals, in an unpublished opinion, reached the merits of a Rule 37(b)(2)(C), SCRCP, sanction that struck a party's pleading and left it unable to defend at trial. Op. No. 2023-UP-369, 2023 WL 7685902, at *5 (Ct. App. Nov. 15, 2023). Here, as in *Jones*, the Sanctions Order neither schedules a deposition nor shifts a cost. It takes away TopBuild's core defenses.

b. An Order Is Appealable When the Resulting Harm Cannot Be Cured on Appeal

The line between managing and deciding is not a formal one. It marks the difference between an error an appeal can still repair and one it cannot, the concern that animates the effects test. The effects test is best understood by the problem it solves. It does not reach every order that dims a party's chances at trial. It reaches only an order that removes material from the case before trial, so that no appellate court can later repair the error. *Thornton*, 391 S.C. at 303–05, 705 S.E.2d at 478–80. Its concern is not ordinary prejudice, but a record that will never be made. *Harbert v. Atlanta & C. Air Line Ry. Co.*, 74 S.C. 13, 16, 53 S.E. 1001, 1002 (1906).

Thornton set the test by which the Sanctions Order must be measured. There, the Thorntons brought a class action against South Carolina Electric and Gas for harm caused by blasting at the Lake Murray Dam, and the circuit court struck their class allegations for failing Rule 23, SCRCP. *Thornton*, 391 S.C. at 300, 705 S.E.2d at 477. The *Thornton* Court held the order was not immediately appealable because "its effect was not to strike a pleading, as its label suggests, but rather to deny class certification on the merits of Rule 23(a), SCRCP," and Rule 23 allows the class claim to be reshaped before any merits decision. *Id.* at 304–05, 705 S.E.2d at 479. The Thorntons still had options at trial, and the normal appeal could still do its work. *Id.* From that reasoning came the two-part test. The order must keep a key issue from being decided on the merits, and it must

leave the party no way to correct the error at trial or on appeal from final judgment. *Id.* at 304, 705 S.E.2d at 479.

Two older cases supplied the foundation for that rule. In *Miles v. Charleston Light & Water Co.*, this Court considered a challenge to an order requiring the plaintiff to make its complaint more definite. 87 S.C. 254, 255–56, 69 S.E. 292, 293 (1910). That order was not immediately appealable on its own. *Id.* at 257, 69 S.E. at 293. But the *Miles* Court took up the appeal because the defendant also challenged a ruling that effectively cut part of the complaint from the case, with no chance of its returning at trial. *Id.* Prejudice alone, *Miles* made clear, does not open the appellate court's doors. The order must permanently remove material from the proceedings.

Bowden v. Powell gave the clearest explanation of why. 194 S.C. 482, 484–85, 10 S.E.2d 8, 9–10 (1940). Citing *Harbert*, the *Bowden* Court explained that, when a court refuses to strike, the disputed material stays in the case and in the record, allowing a reviewing court to correct any error on appeal from final judgment. *Id.* at 484, 10 S.E.2d at 9–10 (citing *Harbert*, 74 S.C. at 16, 53 S.E. at 1002). When material is struck, however, it will not appear in the evidence, the jury charge, or anywhere else in the record. *Id.* at 484, 10 S.E.2d at 9 (citing *Harbert*, 74 S.C. at 16, 53 S.E. at 1002). An appellate court cannot fix what the record does not contain.

That reasoning bites hardest when the order strikes an answer, because striking an answer produces default. *Burkhalter v. Townsend*, 139 S.C. 324, 335, 138 S.E. 34, 37 (1927). A defaulted defendant cannot put on a case. Its part in the trial shrinks to cross-examining the plaintiff's witnesses and objecting to the plaintiff's evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 114, 744 S.E.2d 566, 578 (2013) (holding the proper role of a defendant in a default hearing is "limited to cross-examination and objection to plaintiff's evidence"). A one-sided trial like that leaves no record for review.

South Carolina's courts have applied the same reasoning to orders that never say "strike" yet work the same result. *See Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding an order setting aside a default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to [one party]"). In each case, the inquiry is functional: did the order, whatever its label, end a party's ability to litigate an issue and build a record? Here, the Sanctions Order ended TopBuild's core defense, that there is no connection between TopBuild and any of Robinson's jobsites and no exposure to asbestos from any product sold, installed, or removed by TopBuild.

c. The Sanctions Order Strikes TopBuild's Core Defenses in All but Name

TopBuild answers for Standard as its successor, so the Sanctions Order's commands about Standard bind TopBuild. Two of those provisions end TopBuild's defense. The first directs the jury to presume that Robinson "was exposed to asbestos insulation supplied, installed, and/or removed by Standard . . . during his time as an insulator from 1966–1983." **R. ___; Sanctions Order 19.** The second bars TopBuild from "introducing any opinions, testimony, or evidence suggesting that it did not sell, install, or remove asbestos containing insulation at any worksite of [Robinson]." **R. ___; Sanctions Order 19.** One supplies the exposure Robinson would otherwise have to prove. The other forbids TopBuild from answering it.

Together these provisions remove the two defenses TopBuild has pressed from its first responsive pleading. Answering as Standard's successor, TopBuild denied that it "mined, manufactured, processed, imported and/or sold any asbestos or asbestos-containing material" that caused Robinson's injuries, and denied that Robinson "directly or indirectly purchase[d] any asbestos-containing products or materials" from TopBuild. **R. ___; Answer 38, 45.** Those denials, and others like them, are the core of a product-identification and causation defense. The

presumption establishes exposure through Standard by decree, and the preclusion forbids any evidence that it did not occur. What the Sanctions Order leaves TopBuild is the posture of a defendant whose answer has been struck.

That posture satisfies both conditions of the effects test. The Sanctions Order removes a material issue—exposure and causation—and resolves it on something other than the merits—by presumption rather than proof. *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479. And it leaves TopBuild no way to correct the error during or after trial. *Id.* Unlike the *Thornton* plaintiffs, TopBuild has no path to reshape its defense before a merits ruling, because the merits ruling has already been made. Before the first witness is sworn, the dispositive issue is decided. What remains is cross-examination and objection, and the Sanctions Order strips even those of content, leaving TopBuild unable to suggest, through any question or objection, that Robinson was not exposed to asbestos for which it is responsible. *See Limehouse*, 404 S.C. at 114, 744 S.E.2d at 578. A trial on those terms would be even more one-sided than the default in *Limehouse*, and it would leave no record on liability or causation for this Court to review on appeal from final judgment.

The record confirms what the Sanctions Order's text compels. At the July 9 hearing, TopBuild identified for the circuit court the defenses the motion would strike, including affirmative defenses 16, 27, 29, 30, 55, and 62, and roughly two dozen paragraphs of its answer the motion would convert "from denied to admitted." **R. ___; July 9 Hr'g Tr. 15–16.** The circuit court described its own relief in the same terms, stating that it would "strike the requested portions of [TopBuild's] pleadings." **R. ___; July 9 Hr'g Tr. 38.** Robinson's counsel did as well. As discovery went forward, counsel explained that an expert's opinion no longer mattered because "TopBuild's liability and causation as to Robinson has already been established." **R. ___; Branham Email 1.**

Each participant treated the order as deciding TopBuild's liability before trial, because that is what it does.

Subsection (2)(c) looks to effect, not label. *Thornton*, 391 S.C. at 303, 705 S.E.2d at 478. The Sanctions Order has the effect of striking TopBuild's core defense, directing the jury to presume exposure through Standard and barring TopBuild from proving otherwise. **R. ___; Sanctions Order 19.** It affects a substantial right, it strikes TopBuild's answer in all but name, and it is immediately appealable under section 14-3-330(2)(c). This Court should reach the merits and hold that the Sanctions Order rests on an error of law.

II. The Sanctions Order Is Not Authorized by Rule 37 and Must Be Reversed

A discovery sanction is not a freestanding remedy. It draws its force from the rule that authorizes it, and it reaches only as far as the rule allows. *See* Rule 37(b), SCRCP. That limit holds whatever a court concludes about a party's conduct, because the first question is not whether a sanction is deserved but whether the rule permits it. A sanction that the rule does not authorize is not a measured exercise of discretion, but an error of law that must be reversed. *Welch*, 445 S.C. at 650, 916 S.E.2d at 325.

The Sanctions Order rests on two such errors, and either one requires reversal. First, Rule 37(b)(2) authorizes sanctions only against a party that has disobeyed a discovery order, and no such order preceded the Sanctions Order. Second, Rule 37(b)(2) reaches only a discovery failure in the case before the court, and the testimony the Sanctions Order faulted was given in other lawsuits. The Sanctions Order cannot stand on a rule whose terms it does not satisfy.

a. Rule 37(b)(2) Requires a Disobeyed Discovery Order, and Standard Disobeyed None

Rule 37(b)(2) permits a circuit court to sanction a party that "fails to obey an order to provide or permit discovery," or an order "entered under Rule 26(f)." The disobeyed order is the

trigger for everything that follows. The sanctions the rule then makes available are severe, running from deeming facts established to striking pleadings and entering default, which is why South Carolina's courts have called them "harsh medicine that should not be administered lightly." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997). Medicine that strong is dispensed only on the condition the rule names.

South Carolina's courts have read the rule that way, treating a disobeyed discovery order as a precondition to any Rule 37(b)(2) sanction. *See Enriquez v. SCDC*, 374 S.C. 165, 166, 648 S.E.2d 582, 583 (2007) ("Rule 37(b) expressly provides for an award of sanctions for a party's failure to obey a discovery order."); *Karppi*, 327 S.C. at 542, 489 S.E.2d at 682 ("Rule 37 expressly grants the trial court power to order judgment by default for [] the violation of a court order . . . ." (citing Rule 37(b)(2)(C))); *Downey v. Dixon*, 294 S.C. 42, 44 n.1, 362 S.E.2d 317, 318 n.1 (Ct. App. 1987) ("Rule 37(b) provides sanctions for the violation of an order of the Court to provide or permit discovery."). No disobeyed order, no sanction.

1. The Order Compelling Discovery and the Order Imposing Sanctions Were the Same Order

No discovery order preceded the Sanctions Order, and the Sanctions Order identifies none. It recounts Standard's corporate depositions since 2020, Judson's testimony in this case, and his corrections after he was shown documents from a third party's production in a different case, and then it imposes the sanctions. **R. ___; Sanctions Order 1–14, 18–19.** Nowhere does it find that Standard disobeyed an order to provide or permit discovery, because there was no such order to disobey. **R. ___; Sanctions Order 14–19.** The order imposing sanctions is the same order that first compelled discovery from Standard. It is captioned "Order Granting Motion to Compel . . . and Motion for Sanctions," and it was entered on the docket as "Order/Compel." **R. ___; Sanctions Order 1, 20.** The obligation and the penalty arrived in a single document. A rule written to punish

defiance of an existing order cannot reach a party whose first command to do anything is the order that punishes it.

The July 9 hearing confirms as much. TopBuild argued that this was not the disobedience of any court order, but at most an inconsistency in testimony that could be addressed through cross-examination. **R. ___; July 9 Hr'g Tr. 15–16.** The response was not that an order had been disobeyed, only that the conduct was "a lot more than that." **R. ___; July 9 Hr'g Tr. 16.** But the characterization makes no difference. Rule 37(b)(2) does not turn on how serious a witness's testimony is; it turns on whether a discovery order was disobeyed. None was here.

2. Neither the Re-Deposition Direction nor Rule 37(d) Supplies the Missing Order

Nor does the sole discovery direction fill that gap. At the first hearing on Robinson's motion for sanctions, the circuit court directed that Judson be re-deposed before trial. **R. ___; July 9 Hr'g Tr. 38.** But that direction added nothing the parties had not already set in motion. Robinson's counsel suspended Judson's noticed May 21 deposition before it was finished, telling TopBuild the parties would "meet and confer . . . about when and how to do this next." **R. ___; Judson 5.21.26 Depo. 82:10–18.** The re-deposition was the continuation of that examination, and Standard produced Judson on July 14, before trial, as the parties planned. **R. ___; Judson 7.14.26 Depo.** A direction to proceed with a deposition the parties have already agreed to resume is not an "order to provide or permit discovery" of the kind Rule 37(b)(2) enforces. And even if it were, Standard obeyed it. The sanctions were not imposed for any failure to produce Judson. He was produced, and he submitted to the examination the plaintiff had earlier suspended.

That leaves only Rule 37(d), SCRCP, the single provision under Rule 37 that permits sanctions without a predicate order. It does not apply, because it reaches a party that fails to appear for its own deposition or to serve answers or responses, and Standard did neither. Rule 37(d),

SCRCP. Standard searched its files across four states and its successors' electronic systems, produced over 14,000 pages, served written discovery responses, and produced Judson for a deposition that Robinson's counsel suspended as to some topics but examined at length as to others. **R. ___; Sanctions Order 13–14; TopBuild Resp. 3–6, 16–18; Judson 5.21.26 Depo. 69–86, 92–125.** Whatever else that participation shows, it is not the wholesale default Rule 37(d) addresses. Because Rule 37(b)(2) requires a disobeyed order that never existed, and no other provision authorized these sanctions, the Sanctions Order was imposed contrary to the correct law and should be reversed. *Welch*, 445 S.C. at 650, 916 S.E.2d at 325.

b. Rule 37(b)(2) Reaches Only Failures in the Pending Action, Not Testimony in Other Cases

The Sanctions Order fails for a second, independent reason. Even setting aside the absence of any disobeyed order, Rule 37(b)(2) does not reach the conduct the Sanctions Order rests on, because that conduct occurred in other lawsuits. Rule 37(b) confines a court's sanctioning power to discovery failures in the action before it, and the testimony the Sanctions Order faulted was given years earlier, in separate cases.

1. The Rule's Text and Due Process Confine a Sanction to the Case Where Discovery Was Owed

Start with the text. Rule 37(b)(2) is captioned "Sanctions by Court in Which Action Is Pending," and it empowers "the court in which the action is pending" to enter "such orders in regard to the failure as are just." Rule 37(b)(2), SCRCP. Forum and failure belong to the same case. The rule reaches a party that "fails to obey an order to provide or permit discovery," and the order it means is one entered, and disobeyed, in the action then before the circuit court. *Id.* The remaining words carry the same limit. The rule authorizes orders only "in regard to the failure," the definite article pointing back to a single, identified disobedience. *Id.* And it speaks in the

present tense, reaching a party that "fails to obey," not one whose conduct in an earlier, separate case a court later decides to punish. *Id.* The sanctions the rule lists confirm the limit, because each operates inside the pending action. A court may deem facts established "for the purposes of the action," bar the disobedient party from supporting or opposing designated claims or defenses, strike pleadings or stay the proceedings "until the order is obeyed," or dismiss "the action" itself. Rule 37(b)(2)(A)–(E), SCRCP. Those are remedies for "the failure" in the case the circuit court is deciding, not tools to reach back into litigation that has already closed. Read together, Rule 37(b)(2) confines a court's sanctioning power to a discovery failure in the action pending before it and extends no further. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.").

That confinement is not a drafting accident. It is rooted in due process. Because South Carolina's rules track the federal rules, this Court looks to the federal construction where our own law is silent. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); *see* Rule 37, SCRCP, Note (the rule "uses the language of the Federal Rule with minor changes"). Interpreting the federal counterpart, the Supreme Court of the United States has held that due process constrains a court's discretion to impose discovery sanctions in two respects. A sanction must be "just," and it must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). That specific relation is what due process demands, because a severe discovery sanction is constitutional only on the presumption that a party's refusal to produce

evidence concedes the weakness of its position. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350–51 (1909). The presumption can do its work only within the case where the discovery was owed. A party's silence about its own history in an earlier suit may bear on that suit, but it cannot be treated as a confession that the party has no defense in this one. South Carolina states the same principle more plainly, requiring that a sanction be "aimed at the specific misconduct of the party sanctioned." *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682.

2. The Conduct at Issue Occurred in Earlier Cases, and Standard Complied in This One

Consistent with that limit, this Court's decisions applying Rule 37(b)(2) have tied the sanction to misconduct in the case before the court, and none have reached conduct in another action. *See, e.g., Welch*, 445 S.C. at 648–50, 916 S.E.2d at 324 (affirming discovery sanctions under Rule 37(b)(2) for misconduct in the current case); *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 21–22, 911 S.E.2d 406, 407 (2025) (same); *Davis v. Parkview Apartments*, 409 S.C. 266, 270–80, 762 S.E.2d 535, 537–42 (2014) (affirming discovery sanctions under Rule 37(b)(2) in five different cases because discovery orders were violated in each of those cases); *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593–95, 586 S.E.2d 572, 575–76 (2003) (affirming discovery sanctions under Rule 37(b)(2) for misconduct in the current case); *Halverson v. Yawn*, 328 S.C. 618, 620, 493 S.E.2d 883, 884 (Ct. App. 1997) (same). This case should be no different.

The Sanctions Order departs from that practice, and its own account of the misconduct shows how. It opens not with this case but with three others, recounting that Standard was sued in *Murphy*, *Carpenter*, and *Wannamaker* between 2020 and 2021, and that "throughout the depositions" in those cases Standard testified it never performed industrial work, never handled asbestos, never worked at or supplied Duke Power, and never performed abatement. **R. ___;**

Sanctions Order 1–2. Six pages then walk through the 2021 testimony the circuit court found false, drawn from Fleet's deposition in *Carpenter* and Judson's in *Murphy* and *Wannamaker*. **R. ___; Sanctions Order 3–8.** The Sanctions Order's willfulness finding returns to that same catalog. **R. ___; Sanctions Order 16 n.66.** The Sanctions Order says as much, that the "false representation was only discovered due to documents being produced by a similarly named defendant in a different case." **R. ___; Sanctions Order 16.** The conduct the Sanctions Order condemns predated this action.

This case produced the correction, not the offense. When the documents were put to Judson, he did not resist them. He acknowledged the Belews Creek delivery and Standard's abatement work at Celriver, and he corrected the answers he had given earlier in the same deposition. **R. ___; Judson 5.21.26 Depo. 94–105.** The disagreement that remained was not about facts but about a word. Judson answered questions about "work" as he understood the term, the installation of asbestos products, and once the plaintiff made clear that it used "work" to include regulated removal, Judson accepted that definition and answered accordingly, agreeing that by that measure his earlier answers had been inaccurate. **R. ___; Judson 7.14.26 Depo. 21–50, 71:5–72:23, 99–100.** He then supplied what he had not before, testifying at the continued deposition about the extent of Standard's abatement work and its dealings with Duke Power. **R. ___; Judson 7.14.26 Depo. 21–50, 71:5–72:23, 99–100.** A party that accepts the questioner's documents, adopts the questioner's definitions, and fills in the record as the examination proceeds has not failed to provide discovery in the case where it does so. The documents that prompted all of this came from a third party's production in another case, never from Standard's own files. **R. ___; Sanctions Order 9–10, 16; TopBuild Resp. 8.** Whatever the Sanctions Order found wanting, it was not a

discovery failure here. It was the testimony given years earlier, in other suits, and Rule 37(b)(2) does not reach that testimony.

A witness whose later testimony differs from his earlier answer is confronted with the difference at trial, through cross-examination, and the jury weighs it. Rule 613, SCRE. The Sanctions Order forecloses that ordinary course, deciding the issue by presumption before a jury hears anything. That is not how inconsistent testimony is met.

Nor does the circuit court's inherent authority to sanction supply what Rule 37 cannot. *See State ex rel. McLeod v. Hite*, 272 S.C. 303, 306, 251 S.E.2d 746, 748 (1979). A court's inherent power reaches conduct "calculated to obstruct, degrade, and undermine the administration of justice." *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007) (citing *Hite*, 272 S.C. at 306, 251 S.E.2d at 748). Judson's conduct in this case was not that. As stated, he accepted the documents the moment they were put to him and corrected his testimony once "work" was characterized to include regulated removal. **R. ___; Judson 5.21.26 Depo. 94–104; Judson 7.14.26 Depo. 21–50, 71:5–72:23, 99–100.** A witness who corrects the record as soon as he is shown a reason to is not engaged in the calculated obstruction that inherent authority exists to address. Inherent authority protects the integrity of the proceeding; it does not relieve a plaintiff of his burden of proof. And even after Judson's corrections and the third-party documents, nothing in the record places Standard at a jobsite where Robinson worked.

The two defects share a root. Rule 37(b)(2) measures a sanction against the discovery owed in the pending action, and by that measure the Sanctions Order has nothing to stand on. No order to provide discovery was entered here, so there was no disobedience for the rule to punish. And the conduct the Sanctions Order condemned was not a discovery failure in this case, but testimony given years earlier in other suits, where the rule does not reach. Whatever the Sanctions Order

made of that testimony, the question on appeal is only whether Rule 37(b)(2) authorized these sanctions. It did not. A sanction that rests on a rule whose terms it does not satisfy is not an exercise of discretion this Court defers to. It is an error of law.

CONCLUSION

The circuit court entered these sanctions over testimony Judson gave in earlier cases and later corrected, and TopBuild does not ask this Court to overlook that testimony. But a discovery sanction is only as strong as the rule that authorizes it, and Rule 37(b)(2) does not authorize this one. The rule sanctions a party that disobeys a discovery order, and no such order was entered in this case before the sanctions issued. It reaches discovery failures in the action before the court, and the testimony on which the sanctions rest was given in earlier, separate cases. Two of the sanctions also decide exposure and causation before trial and foreclose TopBuild from contesting them, which affects a substantial right and makes the Sanctions Order immediately appealable under section 14-3-330(2)(c). For these reasons, TopBuild respectfully requests that this Court reverse the Sanctions Order's sanctions and remand for further proceedings.

Signature Page Attached

Respectfully submitted,

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November 3, 2026

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant TopBuild Corporation, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them at the addresses below:

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