

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Maite D. Murphy
Circuit Court Judge

Case No. 2011-CP-07-04999

STEFFANI WALTHER and MICHAEL D. WALTHER.....Appellants,

v.

EDDIE MAPLE and KATE MAPLE, INDIVIDUALLY and
d/b/a EQUINE MANAGEMENT, LLC.....Respondents.

**INITIAL BRIEF OF THE
RESPONDENTS**

THE FLORENCE LAW GROUP, LLC

Phillip Florence
871 Lowcountry Blvd
Suite 100
Mt. Pleasant, South Carolina 29464
Telephone: (843) 352-2667
Fax: (843) 352-2668
Email: phil@theflorencelaw.com
ATTORNEYS FOR RESPONDENTS

December 9, 2014
Charleston, South Carolina

RECEIVED

DEC 11 2014

SC Court of Appeals

STATEMENTS OF ISSUES ON APPEAL

- I. Did the trial Court abuse its discretion, pursuant to Rule 37(b)(2), SCRCPP, by imposing discovery sanctions of dismissal without prejudice against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions?

- II. Did the trial Court abuse its discretion, pursuant to Rule 37(b)(2), SCRCPP, by imposing discovery sanctions of awarding attorney's fees and costs to Respondents against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions?

- III. Are the issues now raised by Appellant regarding the submission to court of the proposed sanctions order and affidavit of attorney's fees in violation of Rule 5(b)(3), SCRCPP, properly preserved for review on appeal where these issues were not previously raised by Appellant's counsel in Appellants Rule 59(e) motion?

TABLE OF CONTENTS

Statement of Issues on Appealii

Table of Contents.....iii

Table of Authorities.....iv

Statement of Case..... 1

Outline of Argument.....11

Argument.....12

I. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRCF, by imposing discovery sanctions of dismissal without prejudice against Appellants for Appellants’ failure to comply with a discovery order requiring Appellants to appear for their depositions.....12

II. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRCF, by imposing discovery sanctions of awarding attorney’s fees and costs to Respondents against Appellants for Appellants’ failure to comply with a discovery order requiring Appellants to appear for their depositions.....17

III. The issues now raised by Appellant regarding the submission to court of the proposed sanctions order and affidavit of attorney’s fees in violation of Rule 5(b)(3), SCRCF, were not properly preserved for review on appeal because these issues were not previously raised by Appellant’s counsel in Appellants Rule 59(e) motion.....18

Conclusion.....21

TABLE OF AUTHORITIES

Case Law:

South Carolina Cases:

Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).....12

Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).....18

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).....19

State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994).....19

Court Rules:

Rule 5, SCRCP.....18, 19

Rule 37, SCRCP.....12, 17, 18, 19

Rule 52(b), SCRCP.....18

Rule 59(e), SCRCP.....18, 19

Rule 60, SCRCP.....18

STATEMENT OF CASE

Appellants commenced this action against Respondents in December of 2011, alleging defamation, intentional infliction of emotional distress/Outrage, breach of contract, promissory estoppel, and unjust enrichment. Since the commencement of this action in December, 2011, the parties exchanged written discovery. Additionally, Respondent's Counsel noticed Appellants' deposition on five separate occasions over a period of two years. On each occasion, the Appellants have cancelled and postponed their scheduled depositions. Upon every cancellation and postponement by Appellants, Respondents has agreed to reschedule the deposition of the Appellants to a date suggested by Appellants' counsel with the exception of the last cancellation which was in clear violation of a court order and precipitated Respondents' Motion for Sanctions against Appellants.

As a result of the numerous cancellations and postponements by Appellants of their duly noticed depositions, Respondents filed a Motion to Compel Appellants' Depositions on April 16, 2013, requesting an Order requiring Appellants to appear at their depositions to avoid any further delays in the discovery process. [Defendants' Notice of Motion and Motion to Compel Deposition of Plaintiffs, dated April 16, 2013]. On July 17, 2013, a hearing on Respondents' Motion to Compel was held before The Honorable Marvin H. Dukes, III. On July 24, 2013, Judge Dukes issued an Order requiring Appellants to appear for their depositions on or before, but no later than, August 28, 2013. [Order of Judge Marvin Dukes, dated July 24, 2013]. Appellants blatantly violated Judge Dukes' order by refusing to appear for their deposition on or before, August 28, 2013.

By way of background, Appellants filed this case against Respondents on November 30, 2011, alleging defamation, intentional infliction of emotional distress/Outrage, breach of

contract, promissory estoppel, and unjust enrichment. [Summons and Complaint, dated November 30, 2011]. Appellants were initially represented by attorney P. Jeffrey North. The Respondents filed an Answer on January 3, 2012, and the parties engaged in the discovery process. [Answer of Defendants, dated December 29, 2011]. Written discovery was exchanged and Respondents' Counsel requested from Appellants' counsel mutually available dates to schedule the depositions of the Appellants. Appellants' counsel informed Respondents' counsel that Appellants were unavailable for deposition until the summer of 2012 due to their travelling schedule. During the summer of 2012, Respondents' counsel again requested available dates to schedule the depositions of the Appellants. Appellants' counsel stated that Appellants were unavailable for depositions but indicated a willingness to resolve the matter out of court. Discovery was put on hold and the parties engaged in settlement negotiations for the next few months.

In December 2012, Respondents' counsel was informed that Mr. North would no longer represent Appellants in this matter. On February 7, 2013, Respondents' counsel was further informed that Robert V. Mathison, Jr. was retained as counsel for Appellants in this matter. [Email correspondence from North to Florence, dated February 7, 2013]. After a status conference with the Court on February 8, 2013, counsel for both parties agreed upon a Consent Scheduling Order in which the discovery deadline was agreed upon as August 15, 2013. [Letter from Florence to Mathison with attached proposed Consent Scheduling Order, dated March 4, 2013]. Subsequently, Respondents' counsel twice noticed and subpoenaed the depositions of Appellants. On March 7, 2013, Respondents duly noticed the Appellants' depositions for March 25, 2013, to be taken at the office of Appellants' counsels, Mr. Mathison. [Email correspondence from Florence to Mathison with attached Notice of Deposition of Plaintiffs,

dated March 7, 2013]. On March 7, 2013, Respondents' counsel received an email from Mr. Mathison stating that he had a conflict with March 25, 2013, but was available for these depositions the entire week of April 8, 2013 and April 15, 2013. Appellants' Counsel also indicated that a formal notice of deposition for the postponed date was not required. [Email correspondence from Mathison to Florence, dated March 7, 2013]. In response, Respondents' counsel agreed to postpone the Appellants' depositions until April 8, 2013. [Email correspondence from Florence to Mathison, dated March 11, 2013].

On April 5, 2013, at 4:17 p.m., the Friday before the Appellants' scheduled depositions, despite the fact that Appellants' counsel had previously represented that he was available the entire week of April 8, 2013, Respondents' counsel received an email from Appellants' counsel stating that the Appellants' depositions were not going forward on April 8, 2013, due to yet another scheduling conflict. [Email correspondence from Mathison to Florence, dated April 5, 2013]. Respondents' counsel responded on that same date and again agreed to postpone the Appellants' depositions but requested that Appellants' counsel provide alternative dates for the Appellants' depositions as soon as possible. [Email correspondence from Florence to Mathison, dated April 5, 2013]. Having not heard anything further from Appellants' counsel for approximately ten days and to avoid any further delays in scheduling Appellants' depositions, Respondents filed a Motion to Compel Appellants' depositions requesting an Order from the court requiring that Appellants appear at their scheduled depositions. [Defendants' Notice of Motion and Motion to Compel Deposition of Plaintiffs, dated April 16, 2013].

Subsequent to the filing of the Motion to Compel against Appellants, Respondents' counsel had a telephone conversation with Appellants' counsel to again attempt to schedule the depositions of Appellants in June of 2013. As a result of their conversation, Respondents'

counsel sent to Appellants' counsel a letter on May 30, 2013, confirming that Appellants counsel informed him that he and Appellants were available for Appellants' deposition in the last two weeks of June. [See Email Correspondence from Florence to Mathison with attached letter, dated May 30, 2013]. Accordingly, on June 10, 2013, Respondents again duly noticed the deposition of Appellants for June 25, 2013. [See Email Correspondence from Florence to Mathison with attached Notice of Deposition of Plaintiffs, dated June 10, 2013]. On June 24, 2013, a day before the scheduled depositions of Appellants, Appellants' counsel notified Respondents' counsel by email requesting that the depositions be postponed to July 2, 2013, because he was "attempting to bring to fruition a major project that must be completed on or before this Wednesday." [Email Correspondence from Mathison to Florence, dated June 24, 2013.] Respondents' counsel again agreed to postpone the scheduled depositions of Appellants but stated that he the only day that he was not available that next week was July 2, 2013, and requested from Appellants' counsel another date during that week to take the depositions of Appellants. [Email Correspondence from Florence to Mathison, dated June 24, 2013]. Having not received a reply from Appellants' counsel, Respondents' counsel again noticed the depositions of Appellants for July 3, 2013. [Email correspondence from Florence to Mathison, dated June 25, 2013]; [See also Notice Third Amended Notice of Deposition of Plaintiffs, dated June 25, 2013]. Appellants counsel again cancelled the depositions of Appellants scheduled for July 3, 2013.

On July 17, 2013, a hearing was held on Respondents' Motion to Compel before The Honorable Marvin H. Dukes, III. During the hearing, Appellants' counsel agreed that Appellants would appear for their depositions on or before August 28, 2013. Accordingly, on July 24, 2013,

Judge Dukes issued an Order requiring Appellants to appear for their depositions on or before, but no later than, August 28, 2013. [Order of Judge Marvin Dukes, dated July 24, 2013].

In accordance with the Order of Judge Dukes dated July 24, 2013, and to allow ample time for Appellants to clear their schedules or determine a date prior the deadline to appear for their depositions, Respondents duly served another notice of deposition to Appellants for August 28, 2013, the agreed upon deadline as ordered by Judge Dukes. [Fourth Amended Notice of Deposition of Plaintiffs, dated August 7, 2013]. However, on August 7, 2013, Appellants' counsel sent an email to Respondents' counsel stating that he had "another matter on that date" that "could be rescheduled." Appellants' counsel also stated in his email that he planned "to be in Columbia on August 29 for a football game." Appellants' counsel further stated in the email that he was "involved in an ongoing hearing before the Securities Commissioner in Columbia that is supposed to resume on a date not yet selected during the same week" and that it was his "preference" that the Appellants depositions in the next month. [Email correspondence from Mathis to Florence, dated August 7, 2013]. Respondents' counsel sent Appellants' counsel a reply email in which he made clear that Respondents did not agree to postpone the deposition past the court ordered date of August 28, 2013. However, in the spirit of cooperation, Respondents' counsel did make clear that Respondents would be amenable to rescheduling the depositions to a date prior to August 28, 2013, to accommodate Appellants' counsel's unidentified scheduling conflicts and requested alternative dates prior to August 28, 2013. [Email correspondence from Florence to Mathis, dated August 7, 2013]. Appellants' counsel never responded to Respondents request for an alternative dates prior to August 28, 2013. Therefore, Respondents' counsel moved forward with his preparations for taking the Appellants depositions on August 28, 2013, the deadline imposed by Judge Dukes' order. On August 27, 2013, the day

before the scheduled date of the depositions, Appellants' counsel sent Respondents' counsel another email stating that not only would the Appellants not appear for the depositions, that his office would not be open on August 28, 2013, that the scheduled date "was not practicable" for him and that he believed that Respondents' counsel "declined to discuss available dates." [Email correspondence from Mathis to Florence, dated August 27, 2013]. Appellants' counsel did not mention in his email anything about any conflicts that he or his clients had on August 28, 2013. Most notably absent from Appellants' counsel's email was any mention of any type of situation involving Appellants' son being hospitalized or that Appellants left on August 26, 2013, to be with their son in the hospital. Even if Appellants did leave on August 26, 2013 to be with their son, Appellants counsel had already, on August 7, 2013, asserted that he did not intend on complying with Judge Dukes' order requiring Appellants to appear for their deposition by August 28, 2013, and preferred that the depositions be postponed to the next month. Additionally, Respondents' counsel clearly indicated that he was amenable to rescheduling the deposition from August 28, 2013, to an earlier date in August of 2013, which received no response from Appellants' counsel. Therefore, the fact that Appellants may have had to leave town on August 26, 2013, is immaterial because Appellants' counsel had already communicated to Respondents' counsel as early as August 7, 2013, that he preferred the depositions be conducted the next month and never responded to Respondents' request for alternative dates prior to the court ordered deadline of August 28, 2013.

On August 28, 2013, Respondents' counsel traveled from Charleston, S.C. to Appellants' counsel's office in Hilton Head to take the court ordered and properly noticed depositions of Appellants or to make a record of the Appellants failure to appear. Respondents' counsel knocked on the front door of Appellants' counsel's office with the court reporter several times

but did not get a response. At that time, Respondent's counsel traveled to the offices of the court reporter and made a full record of the events related to the Appellants' repeated intentional and willful failure to appear for the depositions over the course of the past two years [See Transcript of Deposition, dated August 28, 2013].

Due to the Appellants' repeated willful failure to appear for their depositions and their willful and intentional failure to comply with the discovery Order of Judge Dukes, Respondents filed a Motion for Sanctions against Appellants on September 25, 2013, pursuant to Rule 37 of the South Carolina Rules of Civil Procedure which requested that the Court issue the appropriate sanctions against Appellants including dismissal of all causes of action in this matter with prejudice, and award Respondents' attorney's fees and costs. [Defendant's Notice of Motion and Motion and Memorandum for Sanctions Against Plaintiffs].

On October 2, 2013, the Beaufort County Clerk of Court emailed to Appellants' counsel and Respondents' counsel a motions roster for October 28, 2013, in which Respondents' Motion for Sanctions was scheduled for a hearing before The Honorable Judge Maite Murphy. [Email correspondence from Beaufort County Clerk of Court to Mathison and Florence, dated October 2, 2013]. Out of an abundance of caution, Respondents' counsel forwarded a copy of the applicable motions roster to Appellants counsel on that same day of October 2, 2013. [Email correspondence from Florence to Mathison, dated October 2, 2013]. Therefore, Appellants' counsel received two separate emailed notices of the scheduled hearing for Respondents' Motion for Sanctions on October 2, 2013.

On October 28, 2013, a hearing was held by The Honorable Maite D. Murphy on Respondents' Motion for Sanctions in the above referenced matter. Respondents were represented at the hearing by Phillip Florence, Jr. of the Florence Law Group, LLC. Neither

Appellants nor Appellants' counsel were present at the hearing. The Court confirmed that Appellants' counsel received timely notice of the date and time of the hearing. The Court further delayed the start of the hearing for approximately Thirty (30) minutes to provide Appellants' counsel ample time to arrive at the hearing. Counsel for Appellants did not submit any pleadings, memorandum or affidavits in opposition to Respondents' Motion for Sanctions. [See Order of Judge Maite Murphy, dated October 29, 2013].

At that hearing, Judge Murphy ruled from the bench and granted Respondents' Motion for Sanctions finding that Appellants and Appellants' counsel had cancelled Appellants' scheduled depositions on at least Five (5) separate occasions for unjustified and insufficient reasons and/or without any valid reason at all, and that Appellants willfully and intentionally ignored the Order of this Court issued by The Honorable Marvin H. Dukes, III, issued on July 24, 2013, which required that Appellants appear for their depositions on or before, but no later than, August 28, 2013. Judge Murphy further ordered from the bench that the case be dismissed without prejudice and awarded attorney's fees to Respondents. [See Transcript of Hearing before Judge Murphy dated October 28, 2013, p. 12, ln 4-19]. Judge Murphy directed Defense counsel to submit a proposed order and an affidavit in support of attorney's fees. Defense counsel submitted those documents on October 29, 2013. [See Affidavit of Florence, dated October 29, 2013]. Judge Murphy signed the order granting Respondents' Motion for Sanctions on October 29, 2013. [Order of Judge Maite Murphy, dated October 29, 2013]. The judgment and order was initially submitted for filing by Judge Murphy's office on October 29, 2013, but was returned because the submission of the order did not include the appropriate Form 4. [See Email Correspondence from April Burch, Judgment Clerk to John Guerry, Law Clerk to Honorable Maite Murphy, dated November 15, 2013]; [See Also Email Correspondence from John Guerry,

Law Clerk to Honorable Maite Murphy to Florence, dated November 15, 2013]. Judge Murphy resubmitted the order with the appropriate Form 4 on November 15, 2013. Consequently, the order was not filed and judgment not entered until November 18, 2013. Due to the delay in filing, the Order was not mailed out to Appellants' counsel or Respondents' counsel until November 20, 2013. [See Form 4, dated November 15, 2013]. Respondents' counsel forwarded a copy of the signed and filed Order of Judge Maite Murphy to Appellants' counsel on November 18, 2013. [Email Correspondence from Florence to Mathison, dated November 18, 2013.

On October 29, 2013, soon after the hearing on Respondents' Motion for Sanctions, Appellants' counsel was informed by the court that the Respondents' Motion for Sanctions was granted. After being informed of the court's decision to grant Respondents' Motion for Sanctions, Appellants' counsel informed Defense Counsel by email on October 30, 2013, two days after the hearing, that he intended to file an Affidavit of Robert Mathison and Affidavit of Appellant Steffani Walther in response to Respondents' Motion for Sanctions stating that Ms. Walther found out on August 26, 2013, that her son had been involved in an incident and was hospitalized in California. [See Email Correspondence from Mathison to Florence, dated October 30, 2013.] Since the Affidavits of Robert Mathison and Steffani Walther were filed by Appellants after the hearing and after the signing of the sanctions order, the Affidavits were not properly or timely submitted for consideration by the Court on any of the issues related to Respondents' Motion for Sanctions. Accordingly, Respondents' counsel submitted an objection to the consideration of the Affidavits of Robert Mathison and Appellant Steffani Walther in this matter and Respondents further object to the submission of these affidavits submitted after the hearing and decision by Judge Murphy as part of the record in this appeal.

On November 29, 2013, Appellants served Defense counsel with their Notice of Appeal and Motion for Relief from the Order granting Appellants' Motion for Sanctions. [Plaintiffs' Rule 59(e) Motion for Relief, dated November 29, 2013]; [Plaintiffs' Notice of Appeal, dated November 29, 2013]. On December 11, 2013, Respondents filed their Reply to Plaintiffs' Motion for Relief. [Defendant's Motion for Relief From Order Under Rules 52(b), 59(e) and 60(b), dated December 10, 2013]. Judge Maite Murphy issued an order without a hearing on January 22, 2013, denying Appellants' Motion for Relief.

OUTLINE OF ARGUMENT

I. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRCF, by imposing discovery sanctions of dismissal without prejudice against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions.

II. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRCF, by imposing discovery sanctions of awarding attorney's fees and costs to Respondents against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions.

III. The issues now raised by Appellant regarding the submission to court of the proposed sanctions order and affidavit of attorney's fees in violation of Rule 5(b)(3), SCRCF, were not properly preserved for review on appeal because these issues were not previously raised by Appellant's counsel in Appellants Rule 59(e) motion.

ARGUMENT

Standard of Review

Under Rule 37(b)(2), SCRPC, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred. Id.

- I. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRPC, by imposing discovery sanctions of dismissal without prejudice against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions.

As fully stated earlier, The Honorable Maite Murphy presided over the scheduled hearing on October 28, 2013, for Respondents' Motion for Sanction against Appellants for failure to comply with a discovery order issued by the Honorable Marvin H. Dukes on July 24, 2013, requiring Appellants to appear for their deposition on or before, but not later than, August 28, 2013. Respondents were represented by the undersigned counsel at the hearing. Despite the fact that Appellants' received more than adequate notice of the hearing, neither Appellants nor Appellants' counsel were present at the hearing. The Court confirmed that Appellants' counsel received timely notice of the date and time of the hearing. Respondents submitted both a Motion and supporting Memorandum with Exhibits in support of their Motion for Sanctions all of which were made a part of the record during the hearing. Counsel for Appellants did not submit any pleadings, memorandum or affidavits in opposition to Respondents' Motion for Sanctions. [See Order of Judge Maite Murphy, dated October 29, 2013].

Additionally, Respondents' counsel explained in detail the circumstances over the prior two year time frame concerning Respondents' numerous attempts at scheduling the depositions of Appellants prior to the issuance of the discovery order by Judge Dukes. Subsequent to the issuance of the discovery order by Judge Dukes requiring Appellants to appear for their depositions on or before, but not later than, August 28, 2013, Respondents counsel described to the court his efforts to schedule and take Appellants depositions prior to the court ordered deadline. More specifically, in accordance with the Order of Judge Dukes dated July 24, 2013, and to allow ample time for Appellants to clear their schedules or determine a date prior the deadline to appear for their depositions, Respondents duly served a notice of deposition to Appellants for August 28, 2013, the agreed upon deadline as ordered by Judge Dukes. [Fourth Amended Notice of Deposition of Plaintiffs, dated August 7, 2013]. However, on August 7, 2013, Appellants' counsel sent an email to Respondents' counsel stating that he had "another matter on that date" that "could be rescheduled." Appellants' counsel also stated in his email that he planned "to be in Columbia on August 29 for a football game. Appellants' counsel further stated in the email that he was "involved in an ongoing hearing before the Securities Commissioner in Columbia that is supposed to resume on a date not yet selected during the same week" and that it was his "preference" that the Appellants depositions in the next month. [Email correspondence from Mathis to Florence, dated August 7, 2013]. Respondents' counsel sent Appellants' counsel a reply email in which he made clear that Respondents did not agree to postpone the deposition past the court ordered date of August 28, 2013.

However, in the spirit of cooperation, Respondents' counsel did make clear that Respondents would be amenable to rescheduling the depositions to a date prior to August 28, 2013, to accommodate Appellants' counsel's unidentified scheduling conflicts and requested

alternative dates prior to August 28, 2013. [Email correspondence from Florence to Mathis, dated August 7, 2013]. Appellants' counsel never responded to Respondents request for an alternative dates prior to August 28, 2013. Therefore, Respondents' counsel moved forward with his preparations for taking the Appellants depositions on August 28, 2013, the deadline imposed by Judge Dukes' order.

On August 27, 2013, the day before the scheduled date of the depositions, Appellants' counsel sent Respondents' counsel another email stating that not only would the Appellants not appear for the depositions, that his office would not be open on August 28, 2013, that the scheduled date "was not practicable" for him and that he believed that Respondents' counsel "declined to discuss available dates." [Email correspondence from Mathis to Florence, dated August 27, 2013]. Appellants' counsel did not mention in any of his emails to Respondents' counsel anything about any conflicts that he or his clients had on August 28, 2013. Most notably absent from Appellants' counsel's email was any mention of any type of situation involving Appellants' son being hospitalized or that Appellants left on August 26, 2013, to be with their son in the hospital. Even if Appellants did leave on August 26, 2013 to be with their son, Appellants counsel had already, on August 7, 2013, asserted that he did not intend on complying with Judge Dukes' order requiring Appellants to appear for their deposition by August 28, 2013, and preferred that the depositions be postponed to the next month. Additionally, Respondents' counsel clearly indicated that he was amenable to rescheduling the deposition from August 28, 2013, to an earlier date in August of 2013, which received no response from Appellants' counsel. Therefore, the fact that Appellants may have had to leave town on August 26, 2013, is immaterial because Appellants' counsel had already communicated to Respondents' counsel that

he preferred the depositions be conducted the next month and never responded to Respondents' request for alternative dates prior to the court ordered deadline of August 28, 2013.

On August 28, 2013, Respondents' counsel traveled from Charleston, S.C. to Appellants' counsel's office in Hilton Head to take the court ordered and properly noticed depositions of Appellants or to make a record of the Appellants failure to appear. Respondents' counsel knocked on the front door of Appellants' counsel's office with the court reporter several times but did not get a response. At that time, Respondent's counsel traveled to the offices of the court reporter and made a full record of the events related to the Appellants' repeated intentional and willful failure to appear for the depositions over the course of the past two years [See Transcript of Deposition, dated August 28, 2013].

Having received no rebuttals or reply from Appellants to Respondents assertions in their Motion for Sanctions, Judge Maite Murphy ruled from the bench at the hearing on October 28, 2013, and granted Respondents' Motion for Sanctions ordering that this action be dismissed without prejudice and awarding appropriate attorney's fees and costs to Respondents. Judge requested Murphy requested that Respondents' counsel submit a proposed order and an affidavit of attorney's fees. [See Transcript of Hearing before Judge Maite Murphy, dated October 28, 2013].

Later on the same day as the hearing, Appellants' counsel had a telephone conversation with the Court in which he was informed that Judge Murphy had conducted the hearing and granted Respondents' Motion for Sanctions. [See Affidavit of Robert V. Mathison, Jr., dated November 29, 2013]. In response, on October 30, 2013, two days after the hearing, Appellants submitted an Affidavit of Appellant Steffani Walther which basically stated that she found out on August 25, 2013, that her son was hospitalized in California which required her to be unavailable

for a deposition on August 28, 2013. None of the information as stated in the Affidavit of Steffani Walther was ever communicated by Appellants to Respondents' counsel until two days after the hearing on Respondents' Motion for Sanctions. To the contrary, the only communications from Appellants after the discovery order of Judge Dukes dated July 24, 2013, were emails from Appellants counsel stating that he had "another matter on [August 28, 2013]" that "could be rescheduled." Appellants' counsel also stated in his email that he planned "to be in Columbia on August 29 for a football game." Appellants' counsel further stated in the email that he was "involved in an ongoing hearing before the Securities Commissioner in Columbia that is supposed to resume on a date not yet selected during the same week" and that it was his "preference" that the Appellants depositions in the next month. [Email correspondence from Mathis to Florence, dated August 7, 2013].

On August 27, 2013, the day before the scheduled date of the depositions, Appellants' counsel sent Respondents' counsel another email stating that not only would the Appellants not appear for the depositions, that his office would not be open on August 28, 2013, that the scheduled date "was not practicable" for him and that he believed that Respondents' counsel "declined to discuss available dates." [Email correspondence from Mathis to Florence, dated August 27, 2013]. Appellants' counsel did not mention in his email anything about any conflicts that he or his clients had on August 28, 2013. Most notably absent from Appellants' counsel's email was any mention of any type of situation involving Appellants' son being in hospitalized or that Appellants left on August 26, 2013, to be with their son in the hospital.

Additionally, Respondents' counsel clearly indicated on August 7, 2013, that he was amenable to rescheduling the deposition from August 28, 2013, to an earlier date in August of 2013, which received no response from Appellants' counsel. Therefore, the fact that Appellants

may have had to leave town on August 26, 2013, is immaterial because Appellants' counsel had already communicated to Respondents' counsel as early as August 7, 2013, that he preferred the depositions be conducted the next month and never responded to Respondents' request for alternative dates prior to the court ordered deadline of August 28, 2013. The depositions could have been scheduled at any time between August 7, 2013 and August 26, 2013, when Steffani Walther had to leave to be with her son.

Based upon the detailed record of the circumstances surrounding the Respondents' counsels' numerous attempts to schedule Appellants depositions, especially after the discovery order issued by Judge Dukes requiring Appellants appear for their deposition on or before, but not later than, August 28, 2013, Judge Murphy determined that Appellants have willfully and intentionally failed to appear for their properly noticed depositions on multiple occasions. Accordingly, Judge Murphy did not abuse her discretion in ordering the sanction of dismissal without prejudice against Appellants pursuant to Rule 37(b)(2), SCRCP, for failure to comply with a discovery order requiring Appellants to appear for their depositions. As stated earlier, Appellants counsel was informed of Judge Murphy's ruling on the same day of the hearing.

II. The trial Court did not abuse its discretion, pursuant to Rule 37(b)(2), SCRCP, by imposing discovery sanctions of awarding attorney's fees and costs to Respondents against Appellants for Appellants' failure to comply with a discovery order requiring Appellants to appear for their depositions.

Also, in accordance with the above stated circumstances which were made a part of the record during October 28, 2013, Motion for Sanctions hearing before The Honorable Maite Murphy, Judge Murphy ruled from the bench that Respondents be awarded attorney's fees and costs. [Transcript of Hearing before Judge Maite Murphy, dated October 28, 2013, pg. 12, ln 1-

20]. Respondents' counsel submitted an affidavit of attorney's fees and costs on October 29, 2013, which detailed the attorney's fees and cost related to Respondents' counsel's attempts to schedule and take the deposition of Appellants. Judge Murphy determined that Appellants have willfully and intentionally failed to appear for their properly noticed depositions on multiple occasions. Accordingly, Judge Murphy did not abuse her discretion in ordering the sanction of awarding Respondents attorney's fees and costs pursuant to Rule 37(b)(2), SCRCF, for failure to comply with a discovery order requiring Appellants to appear for their depositions. As stated earlier, Appellants counsel was informed of Judge Murphy's ruling on the same day of the hearing.

III. The issues now raised by Appellant regarding the submission to court of the proposed sanctions order and affidavit of attorney's fees in violation of Rule 5(b)(3), SCRCF, were not properly preserved for review on appeal because these issues were not previously raised by Appellant's counsel in Appellants Rule 59(e) motion.

On November 29, 2013, Appellants filed a Rule 52(b), Rule 59(e) and Rule 60 Motion for Relief which asserted grounds that the trial Court exceeded its discretion in ordering sanctions against Appellants, that the dismissal without prejudice was entered after the running of the applicable statute of limitation for defamation, and that the sanction of attorney's fees and costs were made "without a proper evidentiary hearing, as required by Rule 37, SCRCF, or was made without proper notice." At the time of the filing of Appellants Motion for Relief, Appellants' counsel had received copies of both the proposed order and Respondents counsel's affidavit of attorney's fees and costs. Appellants Motion for Relief and supporting affidavit do not raise or assert any issues related to any violation of Rule 5(b)(3), SCRCF.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." Pye v. Estate of Fox, 369 S.C.

555, 564, 633 S.E.2d 505, 510 (2006). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." A party must file a Rule 59(e), SCRCF, motion to preserve an issue the trial court fails to rule on. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). An issue not properly preserved cannot be raised for the first time on appeal. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Accordingly, Appellants assertions in their Initial Brief that Respondents' violated Rule 5(b)(3) were not raised in their Rule 59(e) Motion for Relief and, therefore, not properly preserved for appeal.

Additionally, Rule 37, SCRCF, does not require an evidentiary hearing regarding an affidavit of attorney's fee and cost. However, in this case, a full evidentiary hearing was conducted by Judge Maite Murphy which was inexplicably not attended by either the Appellants or Appellants counsel. Appellants were given an opportunity to present their arguments against Respondents' Motion for Sanctions by both submitting written pleadings and affidavits, and attending the hearing. Appellants did not submit any pleadings or affidavits in support of their arguments against Respondents' Motion for Sanctions and did not attend the hearing. The only submissions that Appellants filed with the Court in opposition of Respondents' Motion for Sanctions was an affidavit of Steffani Walther which was submitted on October 30, 2013, two days after the hearing and a Rule 59(e) Motion for Relief submitted on November 29, 2013. None of those submissions raised any issues regarding a violation of Rule 5(b)(3) by Respondents.

Respondents would assert that any violation of Rule 5(b)(3) was minor, inadvertent, inconsequential and not prejudicial especially considering that Appellants counsel was informed of Judge Murphy's ruling on Respondents' Motion of Sanctions on the same day that she ruled from the bench at the hearing.

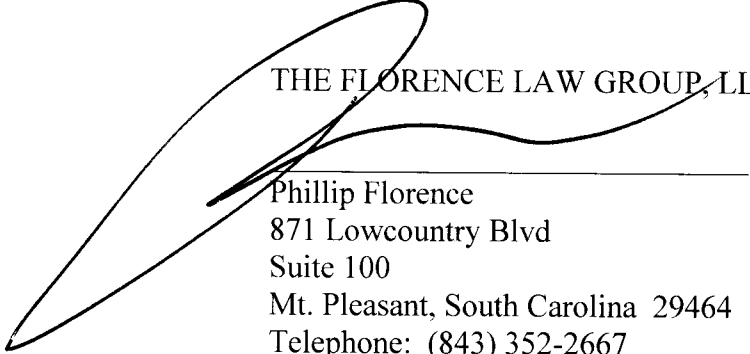
With regards to Appellants assertions related to the statute of limitations for their defamation

action, Appellants assert that the order of Judge Murphy was not filed until November 18, 2013, after the running of the two year statute of limitations on their defamation action which Appellants assert expired on November 5, 2013. The actual ruling by Judge Murphy occurred on October 28, 2013, and the order was signed by Judge Murphy on October 29, 2013, before the alleged expiration date of the two year statute of limitations on Appellants' defamation claims. Appellants counsel was informed of Judge Murphy's ruling on October 28, 2013. The judgment and order was initially submitted for filing by Judge Murphy's office on October 29, 2013, but was returned because the submission of the order did not include the appropriate Form 4. [See Email Correspondence from April Burch, Judgment Clerk to John Guerry, Law Clerk to Honorable Maite Murphy, dated November 15, 2013]; [See Also Email Correspondence from John Guerry, Law Clerk to Honorable Maite Murphy to Florence, dated November 15, 2013]. Judge Murphy resubmitted the order with the appropriate Form 4 on November 15, 2013. Consequently, the order was not filed and judgment not entered until November 18, 2013. Due to the delay in filing, the Order was not mailed out to Appellants' counsel or Respondents' counsel until November 20, 2013. [See Form 4, dated November 15, 2013]. Respondents' counsel forwarded a copy of the signed and filed Order of Judge Maite Murphy to Appellants' counsel on November 18, 2013. [Email Correspondence from Florence to Mathison, dated November 18, 2013. Therefore, the delay in the actual filing of the order for sanctions was not in any way related to any misconduct or wrongdoing of Respondents' counsel.

CONCLUSION

In accordance with the above stated arguments, the trial Court's ruling to issue sanctions of dismissal with prejudice and award attorney's fees and costs to Respondents against Appellants should not be reversed because the trial Court did not abuse its discretion and Appellants appeal should be dismissed.

THE FLORENCE LAW GROUP, LLC



Phillip Florence
871 Lowcountry Blvd
Suite 100
Mt. Pleasant, South Carolina 29464
Telephone: (843) 352-2667
Fax: (843) 352-2668
Email: phil@theflorencelaw.com
ATTORNEYS FOR RESPONDENTS

December 9, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Maite D. Murphy
Circuit Court Judge

Case No. 2011-CP-07-04999

STEFFANI WALTHER and MICHAEL D. WALTHER.....Appellants,

v.

EDDIE MAPLE and KATE MAPLE, INDIVIDUALLY and
d/b/a EQUINE MANAGEMENT, LLC.....Respondents.

PROOF OF SERVICE

I, Phillip Florence, Jr., hereby certify that on December 9, 2014, I filed and served by mail the originals and copies of the Initial Brief of the Respondents and the Respondents' Designation of Matter To Be Included in the Record on Appeal, both dated December 9, 2014, by depositing same, with sufficient first class postage prepaid, at the United States Post Office at Charleston, South Carolina, addressed as follows:

The Honorable Jenny Abbott Kitchings Clerk
of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

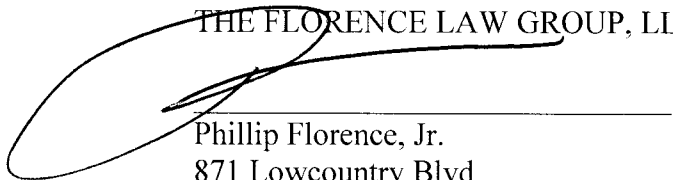
RECEIVED

DEC 11 2014

SC Court of Appeals

Robert V. Mathison Jr.
Mathison & Mathison
PO Box 5271
Hilton Head Island, S.C. 29938

THE FLORENCE LAW GROUP, LLC



Phillip Florence, Jr.
871 Lowcountry Blvd
Suite 100
Mt. Pleasant, South Carolina 29464
Telephone: (843) 352-2667
Fax: (843) 352-2668
Email: phil@theflorencelaw.com
ATTORNEYS FOR RESPONDENTS

December 9, 2014

Charleston, South Carolina



FLORENCE
LAW GROUP

Phillip Florence, Jr.
Attorney at Law

December 9, 2014

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Steffani Walther & Michael Walther v. Eddie Maple & Kate Maple,
individually and d/b/a Equine Management, LLC
Case No.: 2011-CP-07-4999
Appellate Case No.: 2013-002569

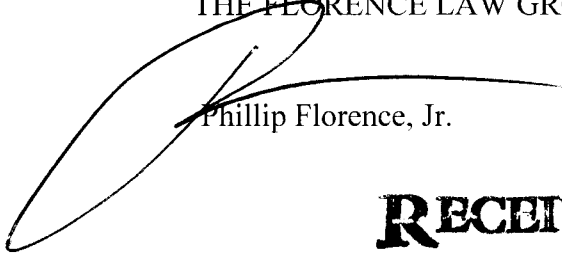
Dear Ms. Kitchings,

I am enclosing herewith for filing the of the following documents:

1. Respondents' Intial Brief dated December 9, 2014;
2. The Respondent's Designation of Matter to Be Included in the Record on Appeal dated December 9, 2014.
3. Proof of Service for Items 1 and 2.

By copy of this letter to Plaintiff's counsel, Robert V. Mathison, Esquire, I am this day serving him with copy of same.

Sincerely,
THE FLORENCE LAW GROUP


Phillip Florence, Jr.

cc: Robert V. Mathison, Jr.

RECEIVED

DEC 11 2014

SC Court of Appeals



1000



29211

U.S. POSTAGE
PAID
MOUNT PLEASANT, SC
29464
DEC 09, 14
AMOUNT
\$2.24
00114150-12

RECEIVED

DEC 11 2011

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

