THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case No. 2017-002472

Community First Bank,..... Appellant,

v.

John M. Powell, Frederick D. Shepherd, Jr., James E. McCoy,
MPS Golf Course, Inc., and MPS Development, Inc.,

Of whom, Frederick D. Shepherd. Jr., is.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Community First Bank's appeal presents two main issues:

I. **Discovery Sanctions.** Discovery rules grant courts discretion to impose sanctions for noncompliance with discovery orders. The trial court entered a Discovery Order instructing Community First Bank to, *inter alia*, produce documents by a deadline. The Bank willfully failed to produce highly relevant documents by that deadline. Did the trial court abuse it discretion in sanctioning the Bank for violating the Discovery Order?

II. **Waiver.** In order to challenge a discovery ruling under well-settled South Carolina law, a party must refuse to comply, suffer contempt, and appeal from the contempt finding. It is undisputed that Community First Bank did not follow that procedure. Has the Bank waived its argument that the Discovery Order is vague and unclear?

STATEMENT OF CASE

On August 21, 2015, Plaintiff/ Appellant Community First Bank (Bank) filed this action to recover amounts due on a loan issued to Bank customer John Powell. (R. p. 1473, lines 11-16.) In addition, the Bank alleged that the loan was actually for insiders Frederick D. Shepherd, Jr. (Shepherd), former Bank CEO, and James McCoy, former Bank Board member. (R. p. 71 at ¶ 19.) Each insider was alleged to conspire-- over a 20-year period starting in the 1990's-- with Powell for the benefit of businesses the three owned, MPS Golf Course, Inc. and MPS Development, Inc. (R. p. 88 at ¶¶ 118-19.)

Defendant/ Appellee Shepherd timely answered the *Complaint* on September 18, 2015 denying the substance of the allegations. (R. pgs. 120-134.) Shepherd also asserted affirmative defenses, including the Statute of Limitations. (R. p. 131 at ¶ 82.)

A. Shepherd's Motion to Compel Discovery

Shortly after answering, Shepherd served the Bank with *Discovery Requests* on September 21, 2015. (R. p. 332.) The Bank timely answered interrogatories on November 20, 2015, and waited on the entry of a *Confidentiality Order* before producing documents.

(R. pgs. 332-33.) The Bank served the first of multiple document productions on February 10, 2016. (R. pg. 334.) The Bank also produced its first privilege log on February 23, 2016. (R. pg. 411.)

After the parties could not resolve its discovery disagreements, Shepherd filed a *Motion to Compel Discovery* on February 26, 2016. (R. pgs. 429-34.) Both parties filed supporting memorandum on March 11, 2016. The trial court conducted a hearing on the *Motion to Compel Discovery* on March 15, 2016, and issued an order granting the Motion on August 1, 2016. (R. pgs. 1-4.)

B. Shepherd's Motion For Sanctions

On September 29, 2016, Shepherd filed a *Motion for Sanctions* alleging willful non-compliance with the Discovery Order. (R. pgs. 429-34.) Shepherd submitted memorandum in support of the Motion on January 13, 2017. (R. pgs. 603-22.) The Bank submitted a responsive memorandum in opposition to the Motion on February 14, 2017. The trial court conducted a hearing on the *Motion for Sanctions* on March 31, 2017. (R. pg. 1396.)

The Court gave the Bank additional time to respond to issues it alleged were newly asserted at the hearing. The Bank filed a memorandum on those issues on April 17, 2017. (R. pgs. 1275-91.) Shepherd submitted responsive memorandum on April 24, 2017. (R. pgs. 1292-1311.) After the legal memorandum and a hearing, the Court granted Shepherd's *Motion for Sanctions* in an Order entered on May 25, 2017 (*Sanctions Order I*). (R. pgs. 5-8.)

Sanctions Order I instructed, among others, the Bank to fully comply with the discovery in 15 days and awarded attorney fees to Shepherd incurred as a result of bringing his *Motion for Sanctions*. (R. p. 6.) The Court also instructed the Bank that it had 15 days to request a

hearing on the amount of attorney fees awarded, and directed Shepherd to file a subsequent formal order. (R. pgs. 6, 8.)

After the 15 days passed without the Bank requesting a hearing to determine the amount of fees and costs, Shepherd served the Court and Bank with affidavits of attorney fees and costs on April 10, 2017. The Bank belatedly requested a hearing on the amount of attorney fees and costs, and the Court held a hearing on July 28, 2017. The Bank filed a memorandum requesting a reduction of attorney fees and costs on July 31, 2017. (R. pgs. 1626-1673.) On September 14, 2017, the trial court entered a Form 4 Order for attorney fees and costs that granted Shepherd $64,920.04, roughly 40% of what was requested, in discovery sanctions and indicated a formal order would follow. (R. pgs. 9-11; R. pgs. 1525:6-9.)

C. Non-Discovery Motions

After the award of attorney fees and costs, the Bank filed a *Motion to Dismiss Shepherd without Prejudice* on October 10, 2017. (R. pgs. 1312-14.) Shepherd responded by filing *Motions for Rule 11 Sanctions and Partial Summary Judgment* on October 17, 2017. (R. pgs. 1315-44.) Shepherd's motions alleged that belatedly produced discovery documents showed the Bank filed its *Complaint* without reasonable grounds to support its allegations, and sought partial summary judgment on the corresponding sections of the *Complaint*. (R. 1334-42.) The trial court scheduled a hearing for November 3, 2017 for these three motions. Before the hearing, Shepherd filed a memorandum in support of the *Motion for Rule 11 Sanctions and Partial Summary Judgment* on November 1, 2017. (R. pgs. 1334-42.) Before those three motions could be heard, the Bank and Shepherd agreed to a dismissal of the lawsuit. The Bank filed its dismissal against Shepherd on January 24, 2018.

D. The Sanctions Appeal

The Bank filed an appeal of *Sanctions Order I* on September 27, 2017 (App. Case No. 017-1985). However, the trial court filed the formal sanctions order mentioned in the Form 4 award of attorney fees on November 13, 2018 (*Sanctions Order II*, Nov. 13, 2017, *R. pgs. 12-38.)* The Bank withdrew the appeal of *Sanctions Order I.*

On November, 17, 2017, the Bank filed a *Motion to Seal* the contents of *Sanctions Order II*, alleging it contained information protected by the Federal Deposit Insurance Company (FDIC) including information contained in the 2012 FDIC report on the Bank. (R pgs. 1345-47.) The Bank abandoned the *Motion to Seal* and appealed *Sanction Orders I and II* on November 30, 2017.

STATEMENT OF FACTS

Fred Shepherd served as President and CEO of Community First Bank for over 25 years until December 30, 2014. (R. pg. 70 at ¶ 14.) In 2007, the Bank induced Shepherd to forego retirement by offering him a contract of retirement benefits that awarded him $210,000 / year for 20 years ($4,200,000) if he continued as Bank President for 5 additional years. (R. pg. 1400:1-11; R. pg. 209 at clause 2.6.)[1] Shepherd completed the five year obligation and retired at the end of 2014. (R. pg. 1400:1-6.)

New Bank management stopped retirement payments within months after his retirement to save money for its stock holders. The Bank filed this present lawsuit as an investigative tool to search for any contract-based reason to keep the 4.2 million dollars.

A. The Bank Begins its Investigation to Justify terminating Retirement Benefits

On August 21, 2015, the Bank filed its lawsuit alleging Shepherd, and others, conspired

[1] Shepherd is currently involved in related ERISA litigation for the wrongful cessation of his retirement benefits. *Frederick D. Shepherd, Jr v. Community First Bank SERP Plan*, ET AL. (15-CV-04337) (D.S.C.)

to defraud the Bank starting in the 1990's, using a series of loans to John Powell that were for the benefit of Shepherd and others. The last alleged fraudulent loan was in 2007, and its last extension was in 2011. (R. p. 72 at ¶ 24; R. p. 74 at ¶ 33.) The *Complaint* was saved from an immediate Statute of Limitations challenge by a section entitled "The Fraudulent Charge-Off." (R. pgs. 80:¶ 68- 82 ¶ 76.)

In the "Fraudulent Charge-Off" section, the Bank alleged the decision to charge the Powell loan off of the Bank's books required presentment to the Bank's Board of Directors. (R. p. 81 at ¶ 71.) The Bank alleged Shepherd unilaterally and clandestinely charged the Powell loan off of the Bank books in March of 2012 (charge-off), an action not known to the Bank until 2014. (R. pgs. 80 at ¶ 69; p. 81 at ¶ 72.)

B. The Bank's Knowledge when it Filed its Complaint

At the time the Bank filed its Complaint, it was in possession of numerous documents that contradicted its allegations. (R. pgs. 19-20; pgs. 702-39.) First, the Bank possessed a FDIC report from 2012 (Report). (R. pgs. 702-39.) According to the Report, the FDIC required the Bank to charge-off the Powell loan. (R. pg 19.) This requirement was acknowledged by every Bank Board member, who reviewed and signed the Report. (R. pgs. 19-20.) The Report's first page gave the Bank specific directions on what to do if the Report was requested in a legal setting: notify the attorney for the requesting party, and the court, of the provisions in "Part 309" of FDIC Rules and Regulations. Part 309 (12 C.F.R. § 309) contains detailed directions on production of the report. (R. pgs. 702; p. 20.)

The FDIC report was a "blueprint" for relevant discovery. (R. p. 20.) The Report: (1) encompassed relevant time periods for document production; (2) referenced relevant Bank investigations into these allegations beginning before 2012; (3) identified substantially

similar loans necessary to compare alleged wrongdoing; and (4) indicated policy changes and documents related to the Powell charge-off. (R. p. 20.)

Next, the Bank possessed April 2012 Board meeting minutes and its handout. (R. pgs. 765-815; 846-47.) The documents illustrated that Shepherd presented the Powell charge-off to the Board of Directors. (R. p. 802.) The meeting minutes reflect that the Powell loan was charged off by unanimous vote. (R. p. 846.)

Last, the Bank possessed internal records and correspondence charting the Powell loan charge-off and confirming the Powell loan charge-off was reviewed frequently. (R. pgs. 741-756 at 749.) Bank ledgers indicate the Bank reviewed the Powell charge-off action quarterly. (R. pgs. 822-23 at 823.)

C. The Discovery Dispute

On September 21, 2015, Shepherd served *Discovery Requests* on the Bank, which requested production of charge-off documents, meeting minutes, similar insider loans, and investigations. (R. pgs. 628:¶ 10; 630:¶¶ 17, 21.) In response, the Bank produced a 7,500 page "document dump" on February 8, 2016 that included heavily redacted meeting minutes and illegible documents. (Discovery Order; R. p. 2-3.) The Bank also asserted a total of 31 boilerplate objections, but failed to produce a concurrent privilege log. (R. pgs. 334-35.)

Shepherd promptly wrote to the Bank, explaining its responses had heavy redactions and the document production was specifically missing meeting minutes, the 2012 FDIC Report, internal documents and correspondence after the charge-off of the Powell loan, and a privilege log. (R. pgs. 405-06.)

The parties were not able to resolve their differences on the Bank's discovery responses and Shepherd filed a *Motion to Compel Discovery*. (R. pgs. 265-67.) The Motion sought an

order directing the Bank to correct illegible and redacted documents, attribute documents to the corresponding discovery requests, and produce missing documents. (R. p. 266.) In response, the Bank asserted to the Court it was in full compliance with its discovery obligations. (R. p. 298.)

The trial court held a hearing on the *Motion to Compel*, during which it ordered the Bank to correct illegible documents, and produce unredacted meeting minutes unless submitted for an *in camera* review. (R. p. 1390:3-17) At the hearing, Shepherd further explained he was missing board meeting minutes, charge-off documents, insider loans, investigations, loan accounts, and specifically the FDIC report mandating the charge-off of the Powell loan that he requested but had not received. (R. pgs. 1364:12-20; 1365:10-12; 1380:1-9; 1381:20-25; 1382:3, 9-13.) The Court did not order the Bank to produce missing documents, but required Shepherd to send the Bank a list of documents previously requested but not produced. (R. p. 1390:13-17.) The trial court also warned the parties that he might assess costs for dealing with these issues. (R. pgs. 1391:1-6; 1394:11-16.)

After the hearing, the Bank corrected its "document dump," attributing specific documents to corresponding discovery requests, and produced legible documents. As to the redactions, the Bank submitted less redacted meeting minutes to the Court for an *in camera* review. (R. p. 929.) The FDIC sent a letter explaining that remaining redactions were a result of its review and assertion of the Bank Secrecy Act (BSA) privilege. (R. p. 930.)

In regards to unproduced documents, Shepherd sent the required list of specified documents he previously requested but had not received. (R. pgs. 887-890.) This list included a request to produce the 2012 FDIC Report, insider loans, investigations, meeting minutes, and loan documents. (R. pgs. 888-89.) The Bank responded it was "not aware of

any order or directive from the Court that we were obligated to produce the documents." (R. p. 891.) Instead of arguing over production of the documents, Shepherd followed up asking the Bank to indicate whether the documents existed, including a specific request to identify the 2012 FDIC Report. (R. pgs. 896-97.)

The Bank failed to respond, so on April 28, 2016, Shepherd wrote correspondence to the Court requesting the order on the *Motion to Compel* include specific rulings regarding matters the parties were still in disagreement on; mainly the production of specific missing Board meeting minutes, the 2012 FDIC report, insider loans, and investigations. (R. pgs. 1754-59.)

Meanwhile, the Bank produced documents in what it termed its "rolling production," but did not produce the FDIC report, insider loans, all meeting minutes, or internal documents concerning the Powell charge-off. (R. p. 606.) The Bank also produced multiple privilege logs, but did not identify the FDIC report, unproduced meeting minutes, insider loans, investigations, or internal documents concerning the Powell charge-off. (*Sanctions Order II*, R. pgs. 23-24.)

The Bank, however, finally responded to Shepherd's April correspondence to the Judge on July 1, 2016. (R. pgs. 911-16.) The Bank stated that it was continuing to produce documents on a "rolling" basis-- almost a year after service of the Discovery Requests, maintained compliance with discovery rules, and requested Shepherd specifically identify any documents for future production. (R. pgs. 912-914.)

On July 26, 2017, in response to the Bank's repeated arbitrary requirement for specific documents to be produced, Shepherd requested the Bank produce only one document: the 2012 FDIC Report. (R. pgs. 694-95.) In addition to requesting the Report's production,

Shepherd explained that the Report was needed because he believed it "directly refute[s] allegations in your Complaint and address statute of limitations issues." (R. p. 694.) The Bank never responded to this request. (*Sanctions Order II,* R. pg. 23.)

The Court issued the Order on the *Motion to Compel* on August 1, 2016. (Discovery Order, R. pgs. 1-4.) The Order included the previous directives to correct: (1) the "document dump;" (2) illegible documents; and (3) heavily redacted meeting minutes. (R. pgs. 2-3.) Additionally, the Court ordered, for the first time, a document production. (R. p. 3.) The Court required Shepherd to send a list of documents he requested by did not receive, and the Bank was ordered to produce the documents within 30 days of receipt of the list. (R. p. 3.) The court again warned the parties that an award of fees and costs could be awarded for compliance with the *Discovery Order.* (R. p. 4.)

The Bank sent correspondence to Shepherd requesting agreement that it had previously complied with the order and arbitrarily gave Shepherd a deadline for waving any disagreements. (R. pgs. 651-52.) Although the correspondence indicated compliance, it specifically failed to address the Order's requirement to produced documents. (R. pgs. 651-52). Shepherd promptly submitted a list of documents for production, which was nothing more than a reiteration of documents requested in previous correspondence and at the *Motion to Compel.* (R. pgs. 654-56; *Sanctions Order II*, R. p. 32.) Frustrated with the Bank's continued silence on the 2012 FDIC Report, Shepherd simultaneously sent three *Requests to Admit*, which were designed to make the Bank admit the existence of the FDIC Report and that it contradicted the allegations of a "fraudulent charge-off." (R. pgs. 24-25.)

In response, the Bank produced some documents on September 16, 2016, the deadline for document production set by the *Discovery Order*, but did not include all relevant

meeting minutes, the 2012 FDIC Report, similar loans, or list subsequently produced documents on a privilege log. (*Sanctions Order II*, R. p. 25.) The Bank also flatly denied each *Request to Admit*, which effectively denied the existence of the FDIC Report (R. p. 25.)

These issues led Shepherd to file a *Motion for Sanctions* on September 21, 2016. (R. pgs. 430-34.) The Motion principally complained of the Bank's willful failure to produce related charge-off documents and insider loans in accord with the *Discovery Order*. (R. p. 433.)

D. Discovery Efforts After the Filing of the Motion for Sanctions

While the Motion was pending, the parties attempted to resolve the discovery the issues without a hearing. (*Sanctions Order II*, R. p. 26.) On November 14, 2016, almost 2 months after the document production deadline, the Bank finally produced a redacted meeting minute evidencing that the Bank Board voted and unanimously approved the charge -off of the Powell loan in April of 2012. (R. p. 26.) The Bank also produced the 2012 FDIC Report on December 14, 2016, as well as other relevant Bank documents regarding the charge-off on December 27, 2016. (R. pgs. 26-27.) Among the relevant documents produced on December 27, 2016 was a Bank letter, written to the IRS Criminal Division, specifically naming Shepherd and complaining of the same alleged conduct in the *Complaint*. (R. p. 27.)

After the Court imposed deadline, the Bank produced redacted minutes without an *in camera* review, the 2012 FDIC Report, internal communications, ledgers, and Bank responses to the FDIC. (R. p. 27.) The Bank conceded it did not produce insider loans by the deadline. (R. p. 1508:8-13.)

E. The Sanctions hearing

On March 31, 2017, the Court held a hearing on Shepherd's *Motion for Sanctions*. Shepherd primarily argued the Bank failed to produce all relevant documents and belatedly produced some documents after the Court's deadline. (R. pgs. 1401:6-1404:7.) In addition, Shepherd illustrated the Bank's failure to identify the FDIC Report was willful, by explaining the Bank's improper denial of the three *Requests to Admit*. (R. pgs. 1432:9-143:18.) Shepherd also explained to the trial court that documents were still unproduced, using the IRS Criminal Division letter as an example. (R. pgs. 1457:4-1459:6.) Shepherd argued that the letter evidenced investigations neither previously disclosed nor produced. *Id.*

The Bank argued Shepherd raised newly-asserted matters: mainly the *Requests to Admit*. (R. p. 1506:19-23.) To cure any issues, the Court gave the Bank an opportunity to respond to matters it contended were newly-raised. *(R. pgs. 1506:24-1507:16.)*

The Bank submitted briefing on the alleged newly-raised issues, including the *Requests to Admit*, IRS letter, and further argued it had not withheld documents. (R. pgs. 1275-91.) Significantly, this Bank brief also changed factual positions and conceded that the Powell loan was charged-off by the Bank Board at the April Board meeting. (R. p 1281.)

F. The parties actions after the Sanctions hearing

Shortly after the hearing on the Motion for Sanctions, Shepherd filed a *Motion for Partial Summary Judgment and Rule 11 Sanctions*. (R. pgs. 1315-1344.) The *Rule 11 Motion* was based on the Bank's assertion of a fraudulent-charge-off while possessing documents that illustrated the charge-off was mandated by the FDIC in 2012 and unanimously approved by the Board. (R. pgs. 1338-42.) The *Partial Summary Judgment*

Motion sought a determination of the veracity of the Complaint allegations regarding the "fraudulent charge-off." (R. pgs. 1334-38.) Before the hearing could be heard, the Bank and Shepherd agreed to a dismissed of the case. (R. pgs. 1312-14.)

STANDARD OF REVIEW

As this Court well knows, "[t]he imposition of sanctions is generally entrusted to the sound discretion of the circuit court." *Downey v Dixon*, 294 S.C. 42, 45 (Ct App. 1987). "Therefore, an appellate court will not interfere with a 'trial court's exercise of discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion." *Davis v. Parkview Apartments*, 409 S.C. 266, 281 (2014 (quoting *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542 (Ct. App. 1997)).

The party appealing from an order of sanctions carries the burden of proving an abuse of discretion occurred. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593 (2003). An appellant carries the burden by showing "the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of the appellant, and, therefore, amounted to an error of law." *See Dunn v. Dunn*, 298 S.C. 499, 502 (1989).

INTRODUCTION & SUMMARY OF ARGUMENT

The trial court sanctioned the Bank after a previous warning and a determination that the Bank willfully withheld documents that were detrimental to its case. The Bank asserted meritless allegations, all the while withholding documents that directly contradicted its assertions and subjected its lawsuit to the statute of limitations. The documents were crucial to Shepherd's defense, and the Bank dismissed its case after he forced their production.

The Bank frames two issues on appeal: (1) the trial court sanctioned the Bank for matters outside of its *Discovery Order*; and (2) the *Discovery Order* was too vague and unclear to support Sanctions. The Bank, however, abandons the first issue and, instead, argues the trial court erred in sanctioning the Bank because it complied with the *Discovery Order*, any noncompliance was the fault of the FDIC, and Shepherd suffered no prejudice.

Each of the Bank's arguments fails. First, the sanction Orders are clearly based on the *Discovery Order* directives, which compelled production of relevant documents by a date certain. The Bank failed to comply with the terms of the *Discovery Order*, instead choosing to divert the trial court's rulings by providing incomplete responses, causing delays, and willfully withholding documents that were both highly-relevant and detrimental to the Bank's case. Although the law presumes prejudice under these circumstances, these actions created delays and additional costs that prejudiced Shepherd.

Next, the Bank has waived arguments relating to the *Discovery Order*, an order it did not appeal. In *Davis v. Parkview Apartments*, the South Carolina Supreme Court stated the procedure for appealing a discovery ruling: a party must refuse to comply with the discovery order, suffer contempt, and appeal from the contempt finding. It is undisputed that the Bank did not follow this procedure and, therefore, waived arguments on the *Discovery Order*.

Even if challenges to the *Discovery Order* are considered on appeal, it was not vague or unclear. Although the Bank argued Shepherd requested "categories of documents" instead of "specific" documents, the trial court correctly found Shepherd's request for documents were specific, complied with discovery rules, and relevant to the allegations in the *Complaint* ("fraudulent charge-off"). There was no confusion amongst the parties as to what the trial court compelled the Bank to produce, and the alleged ambiguity was actually a

burden-shifting tactic used by the Bank.

ARGUMENT

I. THE TRIAL COURT PROPERLY SANCTIONED THE BANK FOR WILFULLY FAILING TO COMPLY WITH ITS DISCOVERY ORDER

The decision to impose sanctions is generally entrusted to the trial court. *Downey,* 294 S.C. at 45. "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County*, 379 S.C. 462, 467 (Ct. App. 2008). The trial court considered these factors, and its determination each weighed in favor of sanctions was supported by the evidence. (*Sanctions Order II*, R. pgs. 35-37.)

A. The Discovery Posture and Nature of Discovery Supported Sanctions

i. The Bank's treatment of the FDIC Report, alone, supports sanctions

On September 21, 2015, Shepherd served *Discovery Requests*. He believed a crucial FDIC Report from 2012 existed and refuted significant allegations in the Bank's *Complaint*. This Report was in the Bank's possession, signed by the Bank Board, and specifically addressed the Defendants by name and the Powell loan charge-off.

After the Bank failed to produce or identify the Report, Shepherd filed a *Motion to Compel* its production. At a hearing on February 26, 2016, the FDIC report's production was specifically raised. From that date through August of 2016, Shepherd continued to request production of the Report in each correspondence with the Bank. The Bank never produced or identified the Report.

The Court entered its *Discovery Order* on August 1, 2016, and Shepherd subsequently requested the Report again. The Order's deadline for producing documents came and went

without production of the Report or identification on a privilege log. Federal requirements on the front page of the Report required the Bank to notify the court and Shepherd of the Report.

Finally, Shepherd requested FDIC contact information from the Bank and corresponded with the FDIC directly. Within two weeks, the FDIC required the Bank to produce the Report. (R. p. 613.)

Under these facts alone, the trial courts' imposition of sanctions was a proper use of the court's discretion. But the conduct is more widespread and egregious. The Bank's willful misconduct regarding the 2012 FDIC Report was merely a part of a pattern of discovery abuse.

ii. The Bank's pattern of discovery abuse supports sanctions

From the outset of the discovery in this litigation, the Bank intentionally obviated and confused discovery. The Bank's started by asserting 31 objections in its initial discovery responses. Its first document production was a "document dump" in no ascertainable order, and the privilege log failed to identify relevant documents.

During the course of discovery, the Bank delayed the case from moving past the initial discovery phase by shifting its discovery burden to Shepherd. It failed to produce and identify documents, claiming full compliance with the discovery rules, unless Shepherd could identify additional documents. These documents were then produced as part of a "rolling production." This conduct made it impossible to determine if the Bank was finished with its document production. The Bank ultimately produced 19 different productions over a span of almost 18 months. (R. p. 606.)

Importantly, the *Discovery Order* put an end to the "rolling production" by mandating

documents produced by a certain date. After that date came and went, the Bank produced the redacted April 2012 meeting minute, the 2012 FDIC Report, and a multitude of other Bank documents relevant to the dispute in violation of the Order.

The Bank claims its "rolling production" was proper under the discovery rules, citing RULE 26(e) which places a duty on party to supplement responses with subsequent information.[2] The trial court properly found this argument as meritless. The Bank mischaracterizes the Rule, as it expressly contemplates an initial *complete* response, not one *continual* response. (*Sanctions Order I*, R. p. 6; *Sanctions Order II*, R. p. 33.)

Additionally, this argument lacks credibility. The Bank did not conduct its "rolling production" in order to produce documents as soon as possible, but in an effort to delay discovery and keep its lawsuit alive by only producing documents specifically requested. Only through the persistence of Shepherd's discovery efforts and motions did the Bank eventually produce documents that were detrimental to its case.

Lastly, the parties were warned at the hearing on Shepherd's *Motion to Compel*, and in the *Discovery Order*, that discovery abuse would result in the imposition of sanctions. The *Discovery Order* required the parties to keep track of related time and costs.

Thus, the evidence supported issuing sanctions for the discovery nature of the case. During the entire course of litigation, the Bank conducted a pattern of discovery abuse that included failing to produce documents, not listing documents on privilege logs, and shifting its discovery burden. The Bank's pattern of discovery abuse created intentional delays and obviated discovery.

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[2] The Bank also asserts Shepherd was "principal custodian of records" at the Bank (Appellant Br. at 22.) This assertion is not found anywhere in the Record on Appeal.

B. The Bank Willfully Withheld Documents that Directly Contradicted its Allegations

The Bank's discovery abuse was willful. It withheld documents that directly contradicted allegations in its *Complaint* and subjected the lawsuit to dismissal on the statute of limitations. The Bank's discovery abuse was designed to withhold damaging documents, and not identify them on its privilege logs, as a means to maintain its lawsuit.

The most egregious example of the willful nature of the Bank's discovery abuse was its conduct surrounding the 2012 FDIC Report. The Bank never listed it on a privilege log, never addressed requests for its production in correspondence, and failed to produce it until December of 2016.

The substance of the report directly refuted the Bank's "fraudulent charge-off" allegations-- that Shepherd clandestinely and unilaterally charged-off the loan. The Report notified the Bank that the FDIC required the Powell charge-off, and each Board of Director at the Bank signed the Report acknowledging this requirement.

Additionally, the Bank withheld internal documents discussing and tracking the Powell charge-off, including the April 2012 Board meeting minutes. This meeting minute also directly refuted allegations. It illustrated the Board voted on, and unanimously approved, the Powell loan charge-off.

The Bank withheld the 2012 FDIC document, April 2012 meeting minutes, and other Bank documents that discussed the Powell loan because each had adverse implications on the case. The Bank, however, argues their withholding of these documents, and failure to identify these documents on a privilege log, is the result of FDIC banking regulations. The Bank primarily argues 12 C.F.R. § 309 prevented the disclosure of documents.

This argument misconstrues the FDIC regulations. 12 C.F.R. § 309, entitled "Disclosure

of Information," explains what a party should do when faced with a discovery request for FDIC documents in that party's custody. According to 12 C.F.R. § 309.7, a party must notify the court and requesting attorney of the documents and refer each to § 309. The Bank did not follow the directions of these sections, which are-- not coincidentally --written on the cover page of the 2012 FDIC Report.

If the Bank followed § 309, it would have notified the court and Shepherd's attorneys of this document, placed it on a privilege log, and referred the parties to the FDIC regulation. The Bank did the opposite: it failed to notify anyone of the documents in its custody, failed to list it as protected, and maintained silence after repeated requests for its production. The Bank cannot use Regulation § 309 to shield it from sanctions for hiding documents.

The Bank additionally asserts the trial court notified the parties that the Bank was in compliance with the FDIC regulations. While the Bank is correct the trial court stated the Bank complied with FDIC regulations, the statement referred only to previously redacted meeting minutes, and not other FDIC documents such as the Report.

More particularly, Shepherd's *Motion to Compel* complained of heavily redacted meeting minutes. The FDIC responded to the trial court's directive to produce less redacted meeting minutes on August 24, 2016, stating it reviewed the meeting minutes and the redactions implicated by the Bank Secrecy Act (BSA) only. After this communication, the trial court found remaining redactions complied with the FDIC review. This is the sole communication in the record from the FDIC. (*Sanctions Order II*, R. p. 35.) There are no communications from the FDIC regarding a Confidential Supervisory Information (CSI) privilege, Regulation § 309, or instruction not to identify or produce documents. *Id.*

Finally, the Bank's actions after the production of these documents provide further proof

of willful discovery abuse. The Bank could only maintain its allegations while withholding documents that contradicted its allegations. Shortly after their production, the Bank switched its story in briefing and stated to the trial court that the Powell loan charge-off was approved at the April 2012 board meeting.

C. The Discovery Abuse Substantially Prejudiced Shepherd

"The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial." *Downey,* 294 S.C. at 46. "Where these rights are not accorded, prejudice must be presumed..." *Id.* The party who failed to follow discovery rules must demonstrate a lack of prejudice. *See id.*

In the case at bar, the Bank's *Complaint* alleged Shepherd began misconduct in the 1990's. Given that witnesses disappear, memories fade, and documents vanish; time was certainly of the essence. The Bank caused intentional, significant delays by obviating discovery. Given the staleness of its allegations, the Bank would be expected to streamline discovery, but it did the exact opposite. It delayed the case against retiree Shepherd to require extra time and money fighting for documents in discovery that were irrefutably discoverable from the outset of the litigation, while simultaneously withholding his earned retirement benefits.

The Bank contends that Shepherd was not prejudiced because he ultimately received the documents before trial. This argument ignores the deadline in the *Discovery Order.* This deadline effectively prevented the Bank's "rolling production," a year after discovery commenced.

Significantly, after the detrimental documents were produced the Bank changed its story and refuted its own assertion of a fraudulent charge-off. Ultimately, this led to the dismissal

of the case. If the documents were produced earlier, the Bank's actions demonstrate the case could have been dismissed much sooner. The Bank's abrupt change in position would have spared Shepherd the time spent fighting the allegations and relieved him of the financial pressures of a discovery battle.

In sum, the Bank's willful discovery abuse prejudiced Shepherd through additional delays and costs. Not only did the trial court properly determined the facts supported that Shepherd was prejudiced, the Bank failed to rebut the presumption of prejudice.

D. The Sanction was Narrowly Tailored, Avoiding Prejudice to the Bank

"...[W]hatever sanction is imposed should serve to protect the rights of discovery provided by the Rules." *Downey*, 294 S.C. at 45. "[O]verleniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery." *Id.* (internal citations omitted). "[T]he sanction should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of the case."

For the Bank's willful discovery abuse, the trial court could have reasonably imposed any of the sanctions authorized under RULE 37 of the SOUTH CAROLINA RULES OF CIVIL PROCEDURE, including striking allegations in pleadings or preventing the Bank from supporting its claims. The trial court, instead, looked leniently on the Bank and chose to only award attorney fees and costs to Shepherd for the additional expenses associated with the Bank's discovery abuse. (R. p. 1511:10-11.)

The trial court "bent over backwards" to: (1) hold a hearing in which the amount of attorney fees and costs were contested after the Bank failed to timely seek a determination on that issue; and (2) allowed the Bank to respond to alleged newly-asserted issues at the sanctions hearing. The results of the hearing were favorable to the Bank, as the trial court

reduced the amount of the sanction by over 50%. (R. p. 1525:6-9.) The trial court also specifically excluded their responses to the Request *to Admit* as part of its underlying basis for sanctions. (*Sanctions Order II* R. p. 31.)

This lenient sanction allowed the Bank to continue with the merits of its lawsuit without prejudice. The sanction imposed was reasonable and narrowly tailored to remedy only Shepherd's additional costs caused by the Bank's discovery abuse.

E. *The Imposition of Sanctions is Supported by Public Policy*

South Carolina has a policy favoring the imposition of penalties against parties whose conduct may warrant sanctions. *See Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 123-24 (Ct. App. 1998) Imposing sanctions for discovery abuse acts as a deterrent, increasing the likelihood of others being deterred from similar conduct in the future. *Id.*

This policy recognizes the discovery phase of litigation works in two instances, when parties are honorable or fearful. If parties who are not honorable believe they are immune from consequences, then discovery becomes largely ineffective. Without the fear present in sanctioning discovery misconduct, dishonorable parties have no reason to comply with the discovery rules.

In the case at bar, did Shepherd get the Bank's damaging documents after requests at the inception of discovery? after the *Motion to Compel*? before the court-ordered deadline? The answer to all of these questions is, "No."

It took the threat of punishment, after the filing of a motion seeking sanctions, before the Bank identified and produced these documents. The production of these documents allowed Shepherd to file a dispositive motion, and, not coincidentally, resulted in the dismissal of the Bank's case.

For Shepherd, the cases resolution came much too late, as earlier production would have likely ended the lawsuit much earlier. Imposing sanctions on the Bank for its willful discovery abuse comports with public policy and provides a future deterrent for parties who may consider discovery gamesmanship in the future.

II. THE BANK WAIVED ITS ARGUMENTS AS TO THE CLEAR AND UNAMBIGUOUS DISCOVERY ORDER

A. The Bank Waived Challenges to the Discovery Order

The Bank has waived any challenge to the trial court's *Discovery Order* that forms the basis for the sanctions. Not only has the Bank failed to appeal that Order, the Bank failed to preserve these arguments by following the well-settled procedure necessary to appeal a discovery order.

"An order directing a party to participate in discovery is interlocutory and not directly appealable..." *Davis v. Parkview Apartments*, 409 S.C. 266, 281 (2014) (internal citations omitted). "...[T]o challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding. *Id.* at 280. If a party continues in discovery, accepting the circuit court's formulation of discovery, that decision forms the law of the case, and binds the party. *Id.* at 281.(internal citations omitted). An appeal of a subsequent sanctions order forecloses issues on the merits of the underlying discovery orders and the only reviewable question on appeal is whether sanctions were properly awarded. *Id.*

In this discovery dispute, the Bank failed to challenge the trial court's underlying *Discovery Order* by refusing to comply. Quite the opposite, the Bank continued with its delay tactics by making multiple "rolling" document productions. These "rolling" productions," though incomplete responses, accepted the trial court's formulation of

discovery and became the law of the case.

Since the Bank failed to follow the well-settled procedure for challenging the trial court's Discovery Order, it has waived these arguments.

B. The Discovery Order was Clear on its Mandates

Even if this Court decides that the Bank has not waived its arguments as to the *Discovery Order*, the arguments fail because there was nothing vague or unclear about the Order itself. The order merely compelled production of the same documents the parties disputed over since the inception of discovery.

The *Discovery Order* required Shepherd to send the Bank a list of documents he contended he requested but had not received, and the Bank was in turn to produce those documents within 30 days of receipt of the list. Shepherd's list contained no documents that he had not repeatedly requested in correspondence with the Bank, briefing with the Court, and at the hearing on the *Motion to Compel.* The identical documents requested were documents pertaining to meeting minutes, investigations, the 2012 FDIC report, insider loans, loan documents, and charge-off related documents. Given the Bank's allegations of a fraudulent charge-off and insider treatment of the Powell loan, it is fairly obvious what documents were being requested.

The Bank asserts the *Discovery Order* was unclear and vague because it interpreted the Order as mandating Shepherd to request "specific" documents and Shepherd allegedly requested "categories" of documents. Notwithstanding the Bank's failure to have its interpretation of the Order clarified, the Court properly rejected that argument as inconsistent with discovery practice and rules. (*Sanctions Order II*, R. p. 32.) To require the degree of specificity required by the Bank would ultimately render discovery mostly

impossible. According to the Bank, Shepherd had to identify each and every document for production. This argument effectively shifts the burden to Shepherd to specifically identify documents to be produced, which contravenes discovery rules that only require requests to be reasonably calculated to lead to the discovery of admissible evidence.

Additionally, the Bank argues that the *Discovery Order* is an infringement on due process restrictions and represents an unauthorized delegation of the trials court's authority. Each of these arguments are newly raised on appeal, not preserved, but, nevertheless, fail of their own accord. The imposition of sanctions did not violate due process because the Bank was punished for willfully withholding documents detrimental to its case, not for confusion on what the order mandated. And the trial court did not delegate its authority; it merely compelled production of discoverable documents Shepherd previously requested.

In sum, the Bank has waived any challenge to the trial court's Discover Order. The Bank failed to appeal the *Discovery Order* and did not follow the well-settled procedure for appealing a discovery ruling. Even if the Bank's arguments regarding the Discover Order are not waived, they fail because the *Discovery Order* was clear in its mandates.

CONCLUSION

The Honorable R. Judge Lawton McIntosh implicitly acknowledged that lawsuits should be more about the merits and less about abusive gamesmanship during discovery. The trial court properly sanctioned the Bank for keeping its lawsuit alive for almost two years by willfully failing to produce documents that were detrimental to its case.

The Judge's order sanctioning the Bank was supported by the facts of the discovery dispute and the prejudice to Shepherd. Having lived with the discovery dispute over the entirety of the litigation, should his decision, assessment of credibility, and factual support

be second-guessed? Shepherd asserts the answer is "no," because the decision reflects sound and supported discretion. The Court should therefore affirm.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to SOUTH CAROLINA APPELLATE COURT RULES, RULE 215, Respondent Shepherd respectfully submits that oral argument is not needed in this case. RULE 215 allows an appellate court to decide cases without oral argument if "it determines that oral argument would not aid the court in resolving the issues."

The present dispute contains: (1) no novel questions of law; (2) no arguments against precedent; and (3) no opportunity to clarify or explain the law of South Carolina. Conversely, the dispositive issues in this case have been authoritatively decided. The cases resolution turns, primarily, on the trial court's factual support for its conclusion to sanction the Bank's discovery abuse, findings clearly stated in the Record. As such, oral argument would not aid the court in resolving the issues.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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