THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

Case No. 2016-CP-40-04463
Appellate Case No. 2018-000924

Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, Respondent,

v.

Sterling Healthcare Inc., Country Wood Nursing Center, LLC, and Guardian Resources, LLC, Appellant.

INITIAL BRIEF OF RESPONDENT

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1. DID THE TRIAL COURT ERR IN STRIKING APPELLANTS' ANSWERS FOR FAILING TO COMPLY WITH AN ORDER COMPELLING DISCOVERY?

STATEMENT OF THE CASE

On February 28, 2014, Respondent, Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, brought this action alleging medical malpractice against Appellant Sterling Healthcare, Inc., Appellant Country Wood Nursing Center, LLC, and Appellant Guardian Resources, LLC. Appellants filed timely Answers.

Respondent served Appellants with discovery requests on August 22, 2014. (App. Brief p. 7.) The Appellants submitted partial responses on or about November 20, 2014, May 5, 2015, and September 25, 2015. *Id.* Respondent did not receive complete responses from the Appellants and filed a Motion to Compel on July 29, 2015. (*See* Motion to Compel.) Thereafter, the case was removed from the roster on July 31, 2015, pursuant to a Rule 40(j) Consent Order. (*See* 40(j) Consent Order.) The case was restored to the docket July 25, 2016. (*See* Order Restoring Case to Docket.)

Respondent's Motion to Compel was heard by the Honorable Edgar Dickson on February 24, 2016. That afternoon, Judge Dickson's law clerk[1] notified the parties via email that Judge Dickson had granted the Respondent's Motion to Compel and requested that both parties submit proposed Orders. (*See* Email of Emily Burgis.) Following the submission of proposed Orders by both parties, Judge Dickson signed Respondent's version of the Order on November 30, 2016. (*See* Order Granting Plaintiff's Motion to Compel Against All Defendants, hereinafter "Dickson Order".)

Thereafter, Respondent filed a Rule to Show Cause and Motion for Sanctions on January 23, 2017, when complete responses were not received pursuant to Judge Dickson's Order. (*See*

[1] Judge Gee was scheduled to hear this case but was unavailable due to illness. Judge Gee's law clerk, Emily Burgis, assisted Judge Dickson at the hearing.

Motion for Rule to Show Cause and Sanctions with Exhibits.) A hearing on Respondent's Motion for Rule to Show Cause and Sanctions was held by the Honorable Alison Renee Lee on July 27, 2017. Following the hearing, Judge Lee took the matter under advisement.

On April 19, 2018, Judge Lee issued an Order striking the Answers of all Defendants due to failure of the Appellants to comply with Judge Dickson's Order and their failure to cooperate in discovery. (*See* Order Striking Answers of All Defendants, hereinafter, Lee Order.) Appellants filed a Notice of Appeal on May 11, 2018.

STATEMENT OF THE FACTS

The Respondent's decedent, Mildred Watkins, was a resident of the Appellants' nursing home, Country Wood, from March 2011 until December 2011. The Respondent filed a Notice of Intent and a Complaint, against all Appellants alleging negligence which resulted in injuries to the Respondent's decedent, and ultimately caused her death. Respondent served all Appellants with discovery requests on August 22, 2014. (App. Brf. p. 7.) The Appellants submitted partial discovery responses on or about November 20, 2014. *Id.* Thereafter, some additional partial responses were produced, but Appellants never produced full and complete discovery responses.[2]

The Respondent filed a Motion to Compel on July 29, 2015. (*See* Notice of Motion and Motion to Compel.) At that time, the Respondent remained without complete responses to her discovery requests. In particular, the Respondent had been provided with only two documents from both Appellant Sterling and Appellant Guardian (the Articles of Incorporation and a "Consulting Agreement" with Country Wood). (*See* Exhibits 1 & 2 to Respondent's Memorandum in Support of Motion to Compel.) The Appellants failed to provide any additional documents or responses during this time period.

The Honorable Edgar Dickson heard the Respondent's Motion to Compel on February 24, 2016. Later that afternoon, counsel for both parties received an email from Law

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[2] On May 5, 2015, Appellant Country Wood supplemented their responses, but only to include the identification of an expert and provide his Curriculum Vitae. On September 25, 2015, Appellant Country Wood provided a Third Supplemental Response, but this response only included: portions of the employee handbook, (most pages were ***redacted in their entirety***); redacted contracts related to two sub-contractors *which did not correspond the date of Respondent's admission*; records from the Richland County Sheriff's Department; and the fee schedule of the appellants' expert. Thereafter, missing Care Plans were also forwarded by Appellants' counsel pursuant to the specific request of Respondent's counsel. No additional documents or responses were produced by Appellant County Wood in this timeframe and no documents were produced whatsoever by Appellant Sterling and Appellant Guardian. (*See* Exhibits to Plaintiff's Memorandum in Support of Motion to Compel.)

Clerk, Emily Burgis, advising that Judge Dickson had granted Respondent's Motion to Compel and requesting that both parties submit proposed Orders. (*See* Burgis email.) At that time, Appellants were on actual notice from the Court that the additional documents and information discussed by the Respondent at the hearing would need to be produced. Both parties submitted proposed Orders.[3] On November 30, 2016, Judge Dickson signed the Respondent's version of the Order Granting Respondent's Motion to Compel Against All Appellants. (Dickson Order.) All Appellants were directed to produce the information specified within twenty (20) days of the date of the Order. (*Id.* at p. 2, ¶ 4.) The time period specified in the Order expired on December 20, 2016.

No information or documents were produced by the Appellants by the December 20, 2016 deadline, despite the fact that the Appellants knew in February that Judge Dickson had ruled in Respondent's favor. (*See* Burgis email.) On December 29, 2016, Respondent's counsel sent a letter to counsel for Appellants asking for production of all documents and information specified in the Order no later than January 6, 2017. (*See* Motion for Rule to Show Cause and Sanctions, Exhibit E.) Respondent's counsel was thereafter contacted by Appellants' attorneys Brantley Rowlen and Leah Parker regarding the missed Order deadline.[4] Ms. Parker requested an extension of one additional week to produce the information specified in the Order. (*Id.* at

[3] Debate ensued between counsel over the wording of the proposed Orders based on a disagreement about the specific statements made by Judge Dickson during the hearing. As such, Respondent's counsel had to incur the expense of obtaining the hearing transcript for Judge Dickson's review, prior to the signing of the Order.

[4] On January 3, 2017, Respondent's counsel received an email from Brantley Rowlen, Esq., counsel for Appellants, advising that they "inadvertently did not calendar the date" but were gathering the information. (*See* Mot. for Rule to Show Cause, Ex. F.) Subsequently, on January 5, 2017, Leah Parker, Esq., counsel for Appellants contacted Respondent's counsel by email, again referencing the "inadvertent calendaring" and stated that due to the holidays and an illness, she had been unable to communicate with her client about the discovery production ordered by Judge Dickson until that week. (*Id.* at Ex. G)

Exhibit G.) Respondent's counsel agreed to withhold the filing of a Rule to Show Cause Motion if she received full and complete production of documents and information by January 13, 2017 (*Id.* at Exhibit H.) As of January 13, 2017, Respondent's counsel had received no information from the Appellants.

On January 19, 2017, Respondent's counsel received a document entitled Appellants' Supplemental Responses to Respondent's Interrogatories and Requests for Production Pursuant to the Order of Judge Dickson. (*See* Exhibit B to Plaintiff's Motion for Rule to Show Cause and Sanctions.) The materials produced therein, did not comply with the Order of Judge Dickson.[5] Ultimately, the responses speak for themselves and Appellants' Supplemental Responses to Respondent's Interrogatories and Requests for Production Pursuant to the Order of Judge Dickson did not comply with Judge Dickson's Order in timeliness nor in content.

Respondent filed a Motion for Rule to Show Cause and Motion for Sanctions on January 23, 2017. (See, Motion for Rule to Show Cause and Sanctions with Exhibits.) In the six (6) month period that Respondent's counsel awaited a hearing date, no further documents or information were produced by any Appellant, until just days prior to the hearing.

The case appeared on the July 31, 2017 trail docket, at which time the Respondent was still without the complete discovery responses, despite Judge Dickson's Order. Respondent remained unable to schedule critical depositions necessary to prepare for trial which would now

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[5] Many of Appellants' responses indicated: "[Appellant] is still in the process of collecting information responsive to this request and will fully respond to the same as soon as such information is located." (*See* Motion for Rule to Show Cause and Sanctions, Ex. B.) Other examples of noncompliance included responses referring Respondent's counsel to government agencies for answers despite Judge Dickson's Order which *specifically stated* that such a response is insufficient. (*Id.* and Dickson Order ¶¶ 22, 27, 28.)

have to be postponed for a second time.[6]

The hearing on Respondent's Motion for Rule to Show Cause and Sanctions was held by the Honorable Alison Renee Lee on July 27, 2017. Judge Lee heard the arguments of counsel for both parties, reviewed the written materials submitted, asked questions of counsel for both parties, and ultimately took the matter under advisement. (*See generally* Lee Transcript.) Additionally, at the hearing, Judge Lee ordered that counsel for Appellants produce a list of documents with their Bates stamped reference numbers, which Appellants' counsel had compiled and had in her possession, to Respondent's counsel *prior to leaving the courthouse.* (Lee Transcript p. 28, ll. 10-16 *emphasis added.*) The document was not produced by the Appellants to Respondent's counsel that day, nor has it been produced as of the date of the filing of this Brief.

While awaiting a ruling from Judge Lee, the trial of the case had to be continued several times and was ultimately pushed back by a Scheduling Order. (*See* Richland County Roster Notices and Scheduling Order.) On April 19, 2018, Judge Lee issued a ruling striking the Answers of all Defendants due to the failure of the Appellants to comply with Judge Dickson's Order. (*See* Lee Order.)

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[6] This case was previously removed from the roster July 31, 2015, pursuant to Rule 40(j) with a Consent Order, due to incomplete discovery. (*See* 40(j) Order.) The case was restored July 25, 2016. (See Order Restoring Case.) At the time the case was restored, no additional information had ben produced to the Respondent by the Appellants during the year the case was removed from the docket. The 40(j) Order allowed for on-going discovery during this period. (*See* 40(j) Order.)

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E. 2d 317, 318 (Ct. App. 1987) The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990).

Under Rule 37(b)(2)(C) of the South Carolina Rules of Civil Procedure, 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. *McNair v. Fairfield County*, 379 S.C. 830, (Ct. App. 2008) (*See also, 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.*

In order to overturn the trial court's decision, the reviewing court must find that an abuse of discretion occurred to justify reversal of a trial court's order to impose discovery sanctions. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); *see also Clark v. Ross*, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985); *see also Skywaves I Corp. v. Branch Banking & Trust Co.*, 814 S.E.2d at 656 (Ct. App. 2018) ; *see also S.C. Dep't of Health & Envtl Control v. FedServ Indus., Inc.*, 294 S.C.33, at 39, 325 S.E.2d 311, at 314-315 (Ct. App. 1987).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN STRIKING THE APPELLANTS' ANSWERS BECAUSE THE COURT'S DECISION WAS BASED ON REASONABLE FACTUAL SUPPORT AND THUS, DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

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 the sanction carries the burden of proving an abuse of discretion occurred. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

An abuse of discretion may be found when the appellant shows that the conclusion reached by the circuit court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 672, 681 (Ct. App. 1997). *See also, Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

In the record to date, including the written materials produced by the parties to Judge Lee at the hearing, the record from Judge Dickson's Motion to Compel hearing, and the statements of counsel at the hearings, there is overwhelming factual evidence to support Judge Lee's determination that the Appellants did not comply with Judge Dickson's Order and that the sanction of striking their Answers was appropriate.

A. APPELLANTS' ON-GOING FAILURE TO PRODUCE PAYROLL RECORDS AND APPELLANTS' COUNSELS' CONTRADICTORY STATEMENTS PROVIDE FACTUAL SUPPORT.

Appellants admit that they were served with discovery requests on August 22, 2014. (App. Brf. p. 7.) Appellants also admit that as of July 10, 2017, the date of the hearing on

Respondent's Motion for Rule to Show Cause and Sanctions, not all documents ordered to be produced by Judge Dickson had been produced. (Lee Transcript, pp. 6-13.)

Respondent made discovery requests for payroll records related to the employees of Appellant Country Wood. At the Motion to Compel hearing on February 24, 2016, Appellants' counsel, Erin Coia, admitted to Judge Dickson: "I have those payroll documents." (Dickson Transcript, p. 30, ll. 8-9.) Appellants' counsel further admitted that the payroll documents were still being withheld because they contained "sensitive information". (*Id.* at p. 31, l.1.) The Appellants' refusal to produce the documents was made despite the fact that the parties had entered into a Confidentiality Order, which would fully protect the Appellants. Thereafter, Judge Dickson's Order issued clear instructions for the Appellants to produce the payroll records that Appellants' counsel asserted in open court were in her possession. (Dickson Order p. 5 ¶19, p. 10 ¶43, p. 11 ¶51.) Despite this Order, Appellants have failed to produce any payroll documents to date.

In direct contrast, at the July 10, 2017 hearing on Respondent's Rule to Show Cause and Motion for Sanctions, Appellants' counsel, Lean Parker, contradicted the statements made by Attorney Coia at the prior hearing: "We're missing payroll records, which we're happy to go to our clients and *try to see if they still have those.*" (Lee Transcript p. 10, ll. 5-7, *emphasis added.*) Judge Lee then asked why that inquiry into the whereabouts of the payroll records had not already been made, (at this point, nearly 8 months after Judge Dickson's Order requiring their production). (*Id.* at p. 10, l. 8) Appellants' counsel responded: "we were under the impression we had produced everything that we were supposed to have produced under the order . . . ." (*Id.* at 10, ll. 11-13) Thus, Ms. Parker contradicted her own prior statement indicating that she would see if her clients still had possession of the payroll documents. (*Id.* at p. 10, ll. 5-7.)

Likewise, if Attorney Parker's statements during the Rule to Show Cause hearing are to be believed, then Attorney Coia clearly lied to Judge Dickson by asserting that Appellants' counsel had the payroll documents, when in fact, they never had possession of such documents, and according to Ms. Parker, had not even spoken with their clients about them. (Lee Transcript p. 10, ll. 5-7.) In reference to the payroll documents, Attorney Parker admitted to Judge Lee that she would need to see if her clients "still have those". (*Id.*) Furthermore, Attorney Parker's statement to Judge Lee directly contradicts her own argument in Appellants' brief which alleges that Judge Lee "never found that, *in this case*, any delay in the production of documents actually has resulted in (a) any witness' failure to recall facts once known; (b) the inability to locate any witnesses; *or (c) the loss or destruction of any critical documents.*" (App. Brf. p. 15, *emphasis added.*) In fact, this concern was specifically noted by Judge Lee in her Order Striking Defendants' Answers, based in part on Attorney Parker's admission at the hearing that she would have to "see if they still have those." (Lee Order p. 6; Lee Transcript p. 10, ll. 5-7)

As argued by Respondent to both Judge Dickson and Judge Lee, payroll records are essential to the Respondent's case and to the ability to take depositions and question critical witnesses who were employees of the Appellants. Appellants state within their own written policies that payroll records are essential to proving the number and type of personnel on duty at the Appellants' facility to state inspectors.[7]

Appellants' counsel, Erin Coia, either lied to Judge Dickson about having possession of the payroll documents, and thereafter intentionally did not produce them despite Judge Dickson's Order, or her co-counsel Leah Parker lied to Judge Lee in asserting that they did not have the

[7] In the limited policy documents produced by Appellants, a policy entitled "Staffing" indicates that payroll records are required by state inspectors to ensure the number and type of personnel on duty.

payroll documents and would need to confirm if they even still existed. Regardless of which attorney was dishonest with the Court, this incident alone illustrates the Appellants' gross indifference to the Respondent's rights and their willingness to be dishonest with the Court. It also provides clear and convincing evidence of the bad faith of the Appellants, shows their callous disregard for their obligations to participate in discovery, and illustrates their willful disobedience of the Order of Judge Dickson. The conflicting statements of Appellants' attorneys at both hearings reinforce that the Appellants made no effort whatsoever to produce the payroll documents, despite the Order of Judge Dickson compelling the same. This incident alone provides clear factual support for Judge Lee's decision and clearly illustrates that there was no abuse of discretion.

B. APPELLANTS' ON-GOING FAILURE TO PRODUCE RESPONSES TO BASIC DISCOVERY REQUESTS PROVIDES FACTUAL SUPPORT.

As further factual evidence in support of Judge Lee's Order Striking the Answers of all Defendants, it is important to note that even the most basic of discovery responses have not been produced by Appellants. To date, Appellants have failed to produce information outlined in Rule 26, Rule 33 and Rule 34 of the Rules of Civil Procedure, including but not limited to essential basic information related to liability insurance and witnesses.

1. APPELLANTS' ON-GOING FAILURE TO PRODUCE LIABILITY INSURANCE INFORMATION, AND TAX AND FINANCIAL DOCUMENTS PROVIDE FACTUAL SUPPORT.

Four (4) years after being served with a standard interrogatory requesting liability insurance information, Appellant Sterling has still failed to produce ***any*** information regarding

liability coverage. Likewise, Appellants Country Wood and Guardian have only produced a single page, entitled "Certificate of Liability Coverage". (*See* Memorandum In Support of Motion to Compel, Exhibit 3.) No additional insurance information, including declarations pages or policies, have been produced for any Appellant. The Country Wood / Guardian Certificate reflects the name of an insurance agent. (*Id.*) However, no insurance policy has ever been provided by the Appellants, despite Judge Dickson's Order specifying the same. (Dickson Order, p. 2, ¶6, P. 5, ¶17.) Likewise, no insurance information whatsoever has been provided for Appellant Sterling, or for the owner of the Appellants' businesses, Robert Hagan; all of which are in direct disobedience to Judge Dickson's Order. (*Id.* at p. 8, ¶ 13, p. 10, ¶42, 45.)

Additionally, the Appellants repeatedly asserted false and contradictory information to the Court. In some responses, the Appellants argued that they were "self-insured" and thus, have no documents to produce.[8] However, in a different response, Appellants produced a single Certificate of Liability coverage, with both Country Wood and Guardian listed thereon, which *specifically lists an insurance agent's name.* This document belies the assertion that they are self-insured. (*See*, Memorandum In Support of Motion to Compel, Exhibit 3; *See also* Footnote 8.) The Appellants flip-flopped in their responses when they simultaneously asserted that they were "in the process of obtaining Certificates of Insurance" and yet, were "self-insured".[9]

Furthermore, as discussed at the hearing with Judge Lee, in the limited number of tax returns produced by Appellants, there are line items on the returns which show payments for

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[8] *See* Plaintiff's Memorandum in Support of Motion to Compel, pp. 3, 13, *quoting* Appellant Country Wood's Responses to Interrogatories and Requests for Production; *See also* Exhibit B to Plaintiff's Motion for Rule to Show Cause and Sanctions, pp. 3, 18.

[9] *Id.*; *See also* Plaintiff's Memorandum in Support of Motion to Compel, p. 30, 59; *See also* Exhibit B to Plaintiff's Motion for Rule to Show Cause and Sanctions pp. 19, 63, 80.

liability insurance. (Lee Transcript p. 18, ll. 3-6.)[10] It is outrageous for the Appellants to assert to the Court that they cannot produce insurance documents because they are self-insured when they have filed documents with the Internal Revenue Service which reflect business expenses for liability insurance payments.

With regard to aforementioned tax returns, Judge Dickson's Order required the production of tax returns for the Appellants from 2005 to 2016. (Dickson Order, p. 7, ¶ 29.) To date, only partial responses have been produced.[11]

The modest number of financial documents which were produced just days before the hearing on Respondent's Motion for Rule to Show Cause and Sanctions do not contain enough information to allow the Respondent to even determine such basic information as the financial relationship between the Appellants, or whether the Country Wood facility was properly funded and staffed to meet the needs of its patients, including the Respondents' decedent.

2. APPELLANTS' ON-GOING FAILURE TO PRODUCE CONTACT INFORMATION AND EMPLOYMENT STATUS FOR WITNESSES PROVIDES FACTUAL SUPPORT.

Appellants' counsel repeatedly argued to Judge Lee that the requests made by Respondent and ordered by Judge Dickson were of such an extreme nature: "that our clients have never had to produce before. So, obtaining these documents was a much more complicated

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[10] The few tax documents produced to the Respondent on the eve of the Rule to Show Cause hearing reflect line item deductions for liability insurance. (See Lee Transcript p. 18, ll. 3-6.) For tax year 2010, $18,551.00 was deducted by Appellant County Rood, and in tax year 2011, $9,766.00 was deducted. (*Id.*)

[11] Six tax returns were produced by Appellant Country Wood, one tax return was produced by Appellant Sterling, two tax returns were produced by Appellant Guardian. (Lee Transcript. p. 19, ll. 2-6.) Additionally, one tax return was produced from Ridgewood, who appears to be an alias of one or more of the Appellants, but whose true identity is unknown to the Respondent.

endeavor than simply pulling documents that we're used to having produced before." (Lee Transcript p. 4, ll. 9-15.) However, the vast majority of the requests sought simple and basic items of production which are routinely requested and disclosed in any case.

The Respondent requested the names, addresses, phone numbers and employment status of witnesses who were employees of the Appellants at the time of the incident. (*See e.g.* Motion for Rule to Show Cause, Exhibit B, pp. 7, 52.) This request is not only reasonable, but is *expressly stated* in the South Carolina Rules of Civil Procedure as falling under the scope of general discovery: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including . . . the identity and location of persons having knowledge of any discoverable matter." (SCRCP 26(b)(1)) The Respondent's request for this information is not outrageous or extreme; it is routine and explicitly authorized by the Rules of Civil Procedure.

The Appellants erroneously asserted to Judge Lee that they had already produced this basic witness information. (Lee Transcript p. 6, ll. 19-24.) However, in actuality, Appellants had only produced ***redacted employee files with the witness contact information specifically removed.*** (*Id.* at p. 6, ll. 5-8, p. 7, ll. 13-19) Judge Lee stated at the hearing: "[W]hen I read your answers, they are no more – they don't provide any more information than what your initial answers provided. I don't know, I don't know how you can say that the documents have already been provided without listing out what information was provided. This request of names and addresses, I got names but *there are no addresses listed. There are no telephone numbers.* There's no, there's no real substance." (*Id.* at p. 5, l. 25 – p. 6, ll. 1-8 *emphasis added.*) In response, Appellants' counsel was forced to admit: "what I realized is that there is additional information that's been redacted from those personnel files in addition to those Social Security

numbers. I noticed that this weekend . . . ." (*Id.* at p. 7. 14-17) She further admits: "We're happy to have a paralegal go through those this week and completely change all the redactions to remove nothing but the Social Security numbers and provide that. That should handle all the, all of the address and phone number issues we have. It should clarify the status of employment. And to the extent that it doesn't, we're happy to go back to our client and find out, you know supplemental information from the date that those personnel files were received by us, whether those employees are still in the employ. That – I, I was under the impression that had already been produced because the personnel files had already been produced. So, that, as I said, was an error." (*Id.* at p. 7, ll. 22-25 – p. 8, ll. 1-9.)

This simple request for contact information and employment status of witnesses was served on the Appellants in August 2014, was ordered to be produced by Judge Dickson in November 2016, and **has yet to be produced to date**. The Appellants' have shown complete disregard of their obligation to participate in even the most basic of discovery under the Rules of Civil Procedure and Judge Dickson's Order. This was evident when Appellants' counsel admitted that no one had even bothered to check and see if they had complied with Judge Dickson's Order until the weekend before the Rule to Show Cause hearing. (*Id.* at p. 7) Furthermore, it is clear that the Appellants had no intention of producing the names, addresses and employment status in a clear and concise response to Respondent's Interrogatory. Instead, even if they had provided un-redacted copies of their employee files, Respondent still have to take each file and search its contents to obtain this information, instead of being provided with a list of the names and addresses of witness directly in response to Respondent's Interrogatory, as required by the Rules of Civil Procedure. The clear factual evidence of the Appellants' gross indifference to the rights of the Respondent and their willful disobedience to the Order of Judge

Dickson is overwhelming.

3. APPELLANTS' MISLEADING ASSERTIONS REGARDING THE AMOUNT OF DOCUMENTS PRODUCED TO DATE PROVIDES FACTUAL SUPPORT

The Appellants, who have failed to produce even the basic information required by Rule 33 and Rule 34 of the South Carolina Rules of Civil Procedure, repeatedly assert a page number estimate of documents produced[12] in a clear and calculated attempt to mislead the court into concluding that they have cooperated in discovery. The Appellants asserted "over ten thousand pages of documents" were produced. (App. Brf. p. 7.) This statement alone is a gross mischaracterization of Appellants' efforts during discovery and is completely misleading to the Court. The overwhelming majority of the documents produced to date are merely copies of past medical history and records that the Appellants subpoenaed from the Respondent's medical providers. These documents, which the Appellants subpoenaed solely in an attempt to bolster their own case and diminish the damages asserted by the Respondent, were merely copied to the Respondents. These subpoenaed documents constitute over 13,500 of the "over ten thousand pages of documents" produced by the Appellants. Additionally, these are all documents that Respondent could obtain with her own medical release, were she to deem them relevant to this matter. Furthermore, 1,796 of the pages produced by the Appellants were merely the decedent's own file from Appellants' facility. These were documents already in the possession of the Respondent, even before the commencement of litigation, and were obtainable with a medical

[12] Only an estimate can be provided by Appellants, as indicated at the hearing before Judge Lee. (Lee Transcript, p. 29, ll. 3-16) Appellants have no actual knowledge of the documents produced to date, or the discovery requests to which they are responsive. (*Id.*)

release. In stark contrast, only a minimal amount of documents, which Respondent could only obtain directly from the Appellants, were produced by the Appellants in discovery. Thus, to assert that the production of documents from prior medical providers is evidence of complete or proper discovery production or compliance with Judge Dickson's Order is simply false and intentionally misleading to the Court. This assertion is particularly outrageous in light of Appellants' on-going failure to produce even the most basic of discoverable documents, such as witness contact information, insurance policies, payroll records, and tax returns.

Shockingly, Appellants have no actual knowledge of exactly what they have produced to date. (Lee Transcript p. 29, ll. 3-16.) Appellants have made widely varied assertions that: "nearly ten thousand pages" have been produced, (App. Brf. p. 5.); "11,496 pages" have been produced, (*Id.* at p. 10.); "10,500 from Country Wood, Sterling and Guardian" (Lee Transcript, p. 11, ll. 15-17.); "21,000 pages of documents produced to date" (*Id.* at ll. 18-19.); and "over twenty-one thousand pages of production". (App. Brf. p. 16.) The Appellants use three (3) different numbers in their Brief alone. Appellants clearly have made no effort to determine the exact documents they have produced to date, the discovery requests to which the documents are responsive, or the additional documents and information which still needs to be produced to the Respondent.

Judge Lee's decision to strike the Appellants' Answers was based on clear factual support, including the gross and willful failure of the Appellants to provide even the most basic discoverable information, as well as the Appellants' complete lack of knowledge of what they have produced to date.

C. APPELLANTS' PRODUCTION OF UNORGANIZED, UNLABELED, INCOMPLETE, AND UNTIMELY DOCUMENTS PROVIDES FACTUAL SUPPORT.

The limited information produced by the Appellants' just prior to the Rule to Show Cause Hearing was produced in an unorganized fashion, which did not even specify the discovery request to which the information was responsive, or the particular Appellant to which the production applied. (Lee Transcript p. 29, ll. 3-16.) Likewise, the limited documents and information produced still did not comply with Judge Dickson's Order.

1. "DOCUMENT DUMP"

At the Rule to Show Cause hearing, Appellants admitted that there are documents and information which still have not been produced pursuant to Judge Dickson's Order of November 30, 2016, nearly two (2) years ago.[13] Likewise, in their Brief, the Appellants again admit "lapses in the production of documents." (App. Brf. p. 15) This factual admission was rightfully considered by Judge Lee: "based upon what I've seen, the request had been outstanding for quite some period of time." (Lee Transcript, p. 5, ll. 2-4) Likewise, the limited documents and information which were produced on the eve of the Rule to Show Cause hearing in July 2017, eight (8) months after Judge Dickson's Order in November, 2016, were not only grossly delinquent, but incomplete. Furthermore, some documents were produced to Respondent's counsel in a "document dump" at the eleventh hour with no specificity as to the discovery request to which they were responsive, or even to the Appellant for whom they were responsive. The documents produced still had critical components missing and were virtually worthless to

[13] *See, supra p.* 9-12.

the Respondent.[14]

Appellants' counsel, Ms. Parker, admitted to Judge Lee that neither she, nor her firm, had any document which reflected the documents produced to date, or the discovery request to which the particular documents are responsive:

> **The Court: "[Y]ou don't have any way of knowing what documents that you sent that were, that were responsive to any particular interrogatory or request for production. You just know the documents that you sent."**
>
> **Ms. Parker: "Yes, Your Honor . . . ."**
>
> **The Court: "Do you have a document that shows what documents were produced in reference to interrogatory number 1?"**
>
> **Ms. Parker: "No. Your Honor."** (Lee Transcript, p. 29, ll 3-16)

The Court further notes:

> **"I don't find the answers to – the second supplemental answers pursuant to Judge Dickson's order as written are not responsive. They don't say any – basically they just say we produced everything or we will produce it. Here it is. But it doesn't tell me what it is, doesn't say what it relates to. There is no way to be able to go through and identify exactly what's responsive to what particular – what document is responsive to what particular interrogatory or request for production, and that's not sufficient. I think the rules require more than that. The rules don't allow you to just say here they are without identifying what they are, and I don't find these responsive. I'm trying to give you the benefit of the doubt, but two and a half, almost three years down the road, it's very difficult to do that. . . . I can't tell if you produced ten pages, much less 20,000 pages, because there's nothing here that tells me what they relate to . . . ."** (Lee Transcript p. 30, ll. 19-25 – p. 31, ll. 1-1-10, 13-16.)

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[14] *E.g.* The production contained a thumb drive which contained several "folders" which were titled, but contained no contents. Likewise, other documents were redacted so heavily that only blank pages were produced.

Judge Lee further states: "you had all those opportunities, and then come in and continue to dump documents without saying what they relate to , which interrogatory, which request for production – it requires you to produce the document in the matter in which they're kept in the ordinary course of business, but you still have to identify what they are. You don't just throw documents at anybody and say here. Here are the documents responsive to your request without providing that information." (Lee Transcript p. 32, ll. 16-24.)

Thereafter, Appellants' counsel attempted to defend the Appellants' lack of knowledge regarding the documents and information produced to date by suggesting that she was new to the case and was still "learning this case". (Lee Transcript p. 6, l. 18.) However, Ms. Parker was substituted as counsel on May 9, 2016, ***before the Order of Judge Dickson***, and ***before the case was restored to the docket from the 40(j)***. (*See* Notice of Substitution of Counsel.) For Ms. Parker to assert to Judge Lee in July 2017, over a year and two months after she was substituted as counsel for her co-worker, Erin Coia, that her lack of knowledge regarding the items produced to date was because she was new to the case is simply not credible. Likewise, Ms. Parker's co-counsel, Mr. Rowland, who was admitted Pro Hac Vice, has been lead attorney on the case since its inception in 2014, and remains on the case to this day. There is simply no valid reason whatsoever that Appellants' counsel should not be aware of the documents produced to date. This is particularly true because Appellants' counsel are employed by a law firm with more than 1,000 attorneys and countless support staff.[15] Appellants' counsel had ample resources at their

[15] According to their website, Appellants' attorneys' firm, Lewis, Brisbois, Bisgaard & Smith, LLP, is a firm with 42 offices in 26 states. The National Law Journal's 2018 NLJ500 ranking of firms based on size noted that the firm was ranked 19th in the United States based on the firm's 1201 attorneys. In contrast, Respondent's counsel's law firm has 4 attorneys and only one office and yet, had to expend unreasonable amounts of time and resources to decipher the responses.

disposal to provide appropriate discovery responses and maintain a simple list of the documents produced to date and to which discovery request they were responsive. Judge Lee noted: "But certainly your firm has enough resources to be able to make a decent response. And to the extent that your client has documents, you've got resources to be able to assist them in being able to provide the appropriate document in the appropriate format." (Lee Transcript, p. 33, ll. 4-9.)

It is astoundingly clear that no effort was made by Appellants or their attorneys to determine what documents or information must be produced under Judge Dickson's Order. Ms. Parker admitted that she had not even bothered to read the transcript from the hearing with Judge Dickson, though it had been produced to Appellants' counsel by Respondents prior to the issuance of Judge Dickson's Order. (Dickson Transcript p. 6, l. 17.) Ms. Parker also repeatedly made references to reviewing the Order over the weekend preceding the Rule to Show Cause hearing and discovering only then that documents and information had not been produced. (Lee Transcript p. 6, ll. 11-14, 21-24, p.7, ll. 14-19.) She acknowledged discovering missing documents on the eve of the hearing: "I noticed this weekend while going through all of this in extreme detail . . . ." *Id.* Clearly no effort was made to comply with Judge Dickson's Order immediately following the issuance of the Order. Instead, at the eleventh hour, Appellants dumped various incomplete, unorganized, redacted, and unlabeled documents onto the Respondent on the eve of the Rule to Show Cause hearing, in an effort to create the appearance of compliance.

Rule 34 of the South Carolina Rules of Civil Procedure states: "The party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." Clearly, the limited documents produced to date were not produced in an organized fashion and were not

labeled to correspond to the discovery request to which they were responsive. Other documents and information were not produced at all, in clear violation of Judge Dickson's Order. This provides additional factual support for Judge Lee's decision to strike the Appellants' Answers.

2. "SPREAD SHEETS"

Because the limited production made by the Appellants was produced in an unorganized fashion with "document dumps" which did not disclose either the discovery request or the exact Appellant to which the information was responsive, Respondent's counsel had to spend an inordinate amount of time matching documents and/or objections with particular discovery requests and with Judge Dickson's Order. In doing so, "spreadsheets" were created by Respondent's counsel to assist her and Judge Lee in determining the items which were still missing.[16] In the "FACTS" portion of Appellants' Brief, counsel discussed in great length the spreadsheets offered by Respondent at the hearing to assist Judge Lee. (App. Brf, p. 9-11) Appellants' counsel notes that Judge Lee mentioned the spreadsheets in her Order and thereafter Appellants' counsel erroneously stated that the spreadsheets "cannot be found on its own docket" (*Id.* at p. 11) The spreadsheets created by Respondent's counsel was produced to Judge Lee and to Appellants' counsel at the hearing. (Lee Transcript, p. 16-17) Appellants' counsel was provided with a copy of the spreadsheets by Respondent's counsel, and the same was made part of the Court's file at the hearing. Ms. Parker acknowledged the spreadsheets, (which she referred to as "charts"), at the hearing. (Lee Transcript p. 23, ll. 13-16) Appellants cannot argue that these documents were not part of Court's record when Appellants discussed the spreadsheets

[16] *See* Exhibits 3-8 to Plaintiff's Memorandum in Support of Motion for Rule to Show Cause and Sanctions.

at the hearing and thereafter, admit in their Brief that there were spreadsheets "produced by Respondent at the hearing, outlining the allegedly missing information." (Lee Transcript p. 23, ll. 13-16; App Brief, p. 9-10)[17]

Likewise, at no time during the hearing, or at any time thereafter, including to the date of the filing of this Brief, did Appellants refute any of the information contained in the spreadsheets, nor did they make a verbal or written objection to the information contained therein. The spreadsheets merely outlined the missing discovery responses which were part of Judge Dickson's Order and the documents which had been produced by the Appellants as of the date of Rule to Show Cause hearing. Judge Lee was within her discretion to review the spreadsheets to assist her in determining the Orders of Judge Dickson which were not complied with by the Appellants. Likewise, with no objection to the spreadsheets or the contents thereof by the Appellants during or following the hearing, she was within her discretion to rely on them, if she was so inclined.

These additional factual examples of the gross indifference to the rights of the Respondent and callous indifference to the Order of the Court provide factual support and justification to Judge Lee's decision to strike the answers of the Appellants.

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[17] *Id.* Of note, the spreadsheets are erroneously referenced by Appellants in their Brief as "Ex. B – Pl.s/ Mem. In Supp. Of Mot. for Rule to Show Cause and Sanctions 32-42" It appears that Appellants' counsel is confusing the identification of exhibits filed with the Motion for Rule to Show Cause, listed by letters A-H, with the exhibits filed and served with the Memorandum in Support of Respondent's Motion for Rule to Show Cause at the hearing, enumerated 1-29.

D. APPELLANTS' INACCURATE ASSERTIONS PROVIDE FACTUAL SUPPORT.

Another unsupported excuse utilized by the Appellants in their attempt to justify their failure to produce discovery responses has been the on-going and false assertion that documents and information cannot be produced from Appellant Sterling because the company went out of business in 2007. Ms. Parker stated to Judge Lee: "Sterling went out of business in 2007 prior to the plaintiff's residency at our nursing home. So there is no information. I mean, there's almost no information from Sterling that is remotely relevant to any of this case." (Lee Transcript p. 24, ll. 9-13.) However, documents produced to both Judge Dickson and Judge Lee by Respondent at the respective hearings establish that this is both false, and intentionally misleading to the Court.

First, Appellant Sterling corresponded with Respondent's counsel on **February 25, 2014** on Sterling letterhead, signed by an executive officer of Sterling Healthcare, Inc. regarding Appellant *Sterling's investigation* of Respondent's pending claim. (Respondent's Memorandum in Support of Motion to Compel, Exhibit 13.) This letter is dated **seven (7) years** after Appellants' counsel claims that Appellant Sterling went out of business. This fact was addressed at the hearings with both Judge Lee and Judge Dickson. (Lee Transcript p. 27, ll. 8-25, p. 28, l. 1; Dickson Transcript. p. 8, 11. 9-20.)

Additionally, the owner of all Appellants' businesses, Robert Hagan, forwarded an Affidavit to Respondent's counsel. (Respondent's Memorandum in Support of Motion to Compel, Exhibit 9.) In the Affidavit dated April 1, 2014, Mr. Hagan stated: "I am the President of Sterling Healthcare, Inc., and have held that position since December 18, 2001." (*Id.* at ¶1.) The Affidavit is signed by Mr. Hagan above the title "President of Sterling Healthcare, Inc.".

(*Id.*) There is no assertion whatsoever that Sterling is no longer in business. (*Id.*) This Affidavit is submitted seven (7) years after the Appellants assert that Appellant Sterling stopped doing business.

Judge Dickson and Judge Lee were provided with further evidence of the active and on-going existence of Appellant Sterling long after 2007 during the Motion to Compel and Rule to Show Cause hearings. (Dickson Transcript pp. 7-12.; Lee Transcript pp. 19-20.) As noted at both hearings, Appellant Sterling is on file with a federal government agency, Medicare, as being the operator / manager of County Wood Nursing Center, LLC, "since 11/19/2007" and each year since that time. (*See* Respondent's Memorandum in Support of Motion to Compel, Exhibit 15.) As of the date of the Rule to Show Cause hearing and presently, Appellant Sterling remains on file with the federal government as the operator / manager of Country Wood. (*Id.*)

Based on the evidence submitted, Judge Dickson clearly did not believe the assertion that Appellant Sterling was no longer in business, as he included Appellant Sterling in his Order compelling discovery. Likewise, Judge Lee included Appellant Sterling in her Order for the same factual reasons.

Based on the factual evidence submitted to both Judge Dickson and Judge Lee, the argument that Appellant Sterling does not exist and thus, Appellants assertion that they cannot provide responses to Respondent's discovery responses is simply false. Likewise, the owner of all of the Appellants' companies is one man, Robert Hagan. (*See* Respondents Memorandum in Support of Motion to Compel, Exhibits 1, 2, 9, 11, & 15.) He is heavily involved in this matter and there is no legitimate reason that he should not be able to produce the information requested. (*Id.*) This provides additional justification for the decision of Judge Lee to strike Appellants' Answers.

II. PREJUDICE TO THE RESPONDENT RESULTED FROM THE APPELLANTS' DELAY AND ON-GOING REFUSAL TO COMPLY WITH THE DISCOVERY ORDER.

The discovery process enables parties to know before the trial begins what evidence may be presented. "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001).

"The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." *Samples v. Mitchell*, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997) (internal quotations omitted). The discovery process is designed to prevent guessing games. *See, e.g. U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). "The rights of discovery provided by the Rules gives the trial lawyer the means to be prepared for trial. Where these rights are not accorded, *prejudice must be presumed* . . . ." *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App 1987) (*emphasis added.*)

This action has been filed since 2014. As of the filing of this Brief in September 2018, Respondent is still without even the most basic information necessary to locate witnesses. Likewise, Respondent cannot evaluate critical documents, such as payroll records, to ensure adequate staffing required by law. Furthermore, Respondent cannot review basic insurance coverage for *any* of the Appellants. The extended delay in the advancement of the case from 2014 to the present is highly prejudicial to the Respondent.

This matter was removed from the roster via Rule 40(j) for one year, with the express agreement that discovery would be on-going. (*See* 40(j) Order.) During this year, there was **no additional discovery production** from the Appellants. Once the case was restored from 40(j),

the case had to be continued on the trial roster on several occasions pending the ruling from Judge Lee. (*See* Richland County Roster Notices.) Despite the fact that four years have passed, the case still remains in the very early stages of discovery. No depositions could be taken by Respondent due to the vast amount of critical information still missing from Appellants and the lack of any contact information. How can the Respondent move forward with the case and depose witnesses when she has no contact information for those witnesses? For the Appellants to suggest that this was not a significant factor considered by Judge Lee at the hearing is simply false, particularly when Judge Lee specifically references her concern of this missing information: "This request of names and addresses, I got names but there are no addresses listed. There are no telephone numbers. There's no, there's no real substance." (Lee Transcript p. 6., ll. 5-8) The case has been at a virtual standstill for the past four (4) years. As Judge Lee aptly noted in her Order: "In this passing time, memories fade, witnesses disappear, and critical documents can be lost and/or destroyed. The harm to the Plaintiff in this case is irreparable and must be met with the harshest of sanctions against the Defendants." (Lee Order, p. 8.)

The delay in the case has also resulted in the loss or destruction of payroll and other documents.[18] Without such documents, Respondent is unable to question witnesses regarding critical matters including the hours worked at the facility and the number of staff members on duty at particular times relevant to Respondent's case. Without financial documents for all Appellants, Respondent is unable to determine the nature and extent of the relationship between the Appellants and their individual obligations related to the care and treatment of the patients at Appellants' facility, including the Respondent's decedent. Without documents which reflect the Interrogatory or Request for production or even the Appellant to which they are related, the

[18] *See discussion supra* p. 9-12.

Respondent is left with documents which are indecipherable and/or non-responsive. Respondent's counsel has had to spend inordinate amounts of time attempting to decipher which documents were responsive to which discovery request, only to discover that a mass of documents remain missing. Now four (4) years in to the case, it cannot be argued that the failure to produce complete discovery responses, and even basic discoverable information, is not highly prejudicial to the Respondent.

In *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008), the Plaintiff did not receive discovery responses over seven (7) months after an Order granting Plaintiff's Motion to Compel. In *McNair,* the Court of Appeals upheld the trial court's decision to strike the Defendant's answer as a sanction for discovery abuse. The Court of Appeals noted: "[T]he defense still has not produced documents 7½ months after this Court passed an Order granting plaintiff's motion to compel. The delay caused by defendant is a further prejudice to plaintiff's right to have his claim heard. . . ." (*Id.* at 467. *quoting the trial court.*) The Court further stated: "The defendant is to blame for this unconscionable delay, and the defendant's conduct amounts to contempt. (*Id.*) The Court considered whether a sanction less than striking the Answer would achieve justice, and this Court concludes not. . . ." (*Id.*) The Court of Appeals further quoted the trial court: "The defendant's conduct in refusing to provide that which it has been ordered to produce is a serious affront to the integrity of the judicial system . . . . The defendant's failure to make any attempt to comply with the court order compelling discovery is a blatant violation of Rule 37(b)(2), SCRCP. (*Id.*) The Court of Appeals agreed and affirmed the Order of the trial court, striking the Defendant's Answer, finding no abuse of discretion. (Id.)

The delay in producing discovery responses by the Appellants in this matter is even more

egregious than the defendant in *McNair*. At the time of the Rule to Show Cause hearing, it had been over seven (7) months since Judge Dickson's Order Compelling Discovery was signed, more than sixteen (16) months since Judge Dickson's law clerk advised the Defendants that Judge Dickson granted Plaintiff's Motion to Compel, and nearly three (3) years since the Defendants were first served with discovery. In *McNair*, the Court of Appeals determined that the trial court considered the appropriate factors, and determined the Defendant's willful disobedience of a court order warranted the severe sanction of striking the Answer. Certainly, similar sanctions are warranted in this case.

Appellants have failed to produce any evidence to support their argument that the Respondent has not been prejudiced by their willful delay and outright refusal to produce any discovery responses to certain requests, despite an Order compelling such production. Even in the heading of their Argument, Appellants misstate the law and attempt to shift the burden of proof to the Respondent (improperly identified as Appellee), stating that "there is no basis for its finding that Appellee [sic] has been prejudiced by the delay in production of documents." (App. Brf. p. 12) The Appellants argue that Judge Lee made a "conclusory finding of prejudice without weighing the facts or concerns necessary to support its ruling." (App. Brf. p. 13) However, in a review of the transcript, it is evident that Judge Lee weighed multiple facts and addressed in detail the Appellants' concerns directly with Appellants' counsel. Appellants allege that Judge Lee relied in part on the precedent set in *McNair* to hold "that a delay in responding to discovery, *and nothing more*, permitted it to strike Appellant's answer." (*Id.* at 14, *emphasis added.)* This statement is complete conjecture without any factual support. The specific facts detailed herein clearly illustrate that more than just the delay in responding was considered by Judge Lee. Likewise, Appellants' lose the benefit of this argument since they *completely failed*

to produce a large number of documents and information. It's not merely the delay, ***but the complete lack of production of certain documents and information Ordered by Judge Dickson,*** that provide the factual support for Judge Lee's decision.

Likewise, the Appellants repeatedly attempt to downplay their unconscionable delay in the production of documents. The delays in this case are far from trivial. The Respondent has been waiting for over four (4) years for responses to her discovery requests, and over a year and nine months since the Order compelling specific production of documents and information. This is not an inconsequential delay or a petty oversight. The time and scope of the failure to produce documents is calculated and intentional and reflects a gross disregard of the Order of Judge Dickson and the Rules of Civil Procedure. The prejudice caused by this outrageous delay is not merely presumed, but it is patently obvious and was thoroughly discussed and debated at both hearings. Respondent presented numerous examples of prejudice to both Judge Dickson and Judge Lee, many of which have been outlined herein again.

Furthermore, it is the Appellants' duty to show the absence of prejudice. *Downey* at 46. The Appellants have presented no evidence whatsoever that the Respondent has not been prejudiced by their unreasonable delays and their outright failures to comply with Judge Dickson's Order. There is ample evidence of prejudice to the Respondent resulting from the Appellants' delays and obstructionist tactics over the past four (4) years. Judge Lee applied the factual evidence and did not abuse her discretion by imposing the sanction of striking the Appellants' Answers.

III. APPELLANTS' IMPROPER ARGUMENTS

At the Rule to Show Cause hearing, Appellants attempted to re-litigate the merits of the

Motion to Compel hearing and take issue with the subsequent Order of Judge Dickson. This was improper, as the purpose of the Rule to Show Cause hearing was solely to determine if the Appellants had complied with Judge Dickson's Order and if not, what sanctions were warranted.

A. APPELLANTS IMPROPERLY ATTEMPTED TO RELITIGATE THE MERITS OF THE MOTION TO COMPEL HEARING

Appellants argue in the "FACTS" section of their brief that Judge Lee failed to "weigh the sheer breadth and depth of the discovery order . . . ." (App. Brf. p. 10.) However, the scope of the Rule to Show Cause and Sanctions hearing was solely to determine if the Appellants had failed to comply with Judge Dickson's Order, and if so, the proper sanction. (*See*, SCRCP 37(b).) The hearing with Judge Lee was not an appeal of Judge Dickson's Order, nor a Motion to Reconsider. Appellants filed neither. Judge Lee stated: "I'm not here to relitigate the issue about whether the requests were proper, whether there were any proper objections to them, whether there was privileged information or confidential information." (Lee Transcript p. 30, ll. 8-12.) "That's up to Judge Dickson." (*Id.* at ll. 7-8.) Judge Lee correctly noted: "I never saw any correspondence that showed any attempt to have discussions with counsel about the information, or even tailoring the request in a more narrow way, or any real argument about the merits of your objections that were raised to the initial documents that may have been before Judge Dickson. . . . I didn't see where there was a request back to Judge Dickson to say Judge Dickson, we need more time to be able to respond to this, given the specificity of what you've ordered." (Lee Transcript p. 5, ll. 7-12, 21-24.)

Judge Lee notes: "And if you needed additional time, it didn't – you didn't have to go through Ms. Purdy to get it. You should have asked a motion to reconsider, a motion to clarify

to Judge Dickson to ask for additional time . . . . You had all those opportunities, and then come in and continue to dump documents without saying what they relate to, which interrogatory, which request for production – it requires you to produce the document in the manner in which they're kept in the ordinary course of business, but you still have to identify what they are." (Lee Transcript p. 32, ll. 6-21.)

The Appellants made no effort whatsoever to comply with Judge Dickson's Order. They simply ignored the Order for nearly eight (8) months until the eve of the Rule to Show Cause hearing, at which time they dumped random, unlabeled, heavily redacted documents on the Respondent without even delineating the request to which they were responsive or to which Appellant they applied.

B. JUDGE LEE CAREFULLY CONSIDERED THE PRODUCTION OF DOCUMENTS MADE BY THE APPELLANTS JUST PRIOR TO THE RULE TO SHOW CAUSE HEARING

The Appellants argue in their "FACTS" section of the Brief that Judge Lee "did not assess how that recent effort [supplemental productions made just prior to the hearing] affected the posture of the motion." (App Brf. p. 10) This argument is unsupported.

First, Respondent did not argue to Judge Lee that any of the documents produced on the eve of the hearing were still missing. In fact, Respondent's counsel acknowledged to Judge Lee that additional documents had been produced, but they had been delivered in a disorganized and delinquent manner. (Lee Transcript p. 20, ll. 22-25 – p. 21, ll. 1-7.) Likewise, those 11th hour submissions were not included in the spreadsheets of missing items which were submitted to Judge Lee at the hearing. The Appellants' document production just prior to the hearing was

specifically acknowledged by Judge Lee as she repeatedly questioned Appellants' counsel as to the manner in which those documents were produced and the documents which were still missing from that production. (*See* Lee Transcript p. 6, ll. 1-8, p. 9, ll. 6-12, p. 10, ll. 1-8; p. 12, ll. 24-24, p. 13, ll. 1-13, p. 32, ll. 16-24.)

Respondent addressed in great detail the large number of items ordered by Judge Dickson which had still not been produced. (*See e.g.* Lee Transcript pp. 17-23.) Thus, Judge Lee also considered the documents and information which still had not been produced pursuant to Judge Dickson's Order. Those documents, as outlined on the spreadsheets, were still missing at the time of the hearing and have not been supplemented to date. These missing documents ordered by Judge Dickson provided factual support for Judge Lee's decision.

IV. JUDGE LEE GAVE THE MATTER SERIOUS CONSIDERATION AND DID NOT ABUSE HER DISCRETION IN STRIKING THE ANSWERS OF THE APPELLANTS.

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. *Morgan v. Jones,* 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984).[19] The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). In order to overturn the trial court's decision, the reviewing court must find that an abuse of discretion occurred to justify reversal of a trial court's order to impose discovery sanctions. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); *see also*

[19] *See also, Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E. 2d 672, 681 (Ct. App. 1997); *see also, Downey v. Dixon*, 294 S.C. 42,45, 362 S.E. 2d 317, 318 (Ct. App. 1987); *see also, Skywaves I Corp. v. Branch Banking & Trust Co.*, 814 S.E. 2d 643, 656 (Ct. App. 2018); *see also, S.C. Dep't of Health & Envtl. Control v. Fed-Serv Indus.*, 294 S.C. 33, 39, 325 S.E. 2d 311, 314-315 (Ct. App. 1987).

Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985); *see also Skywaves*, 814 S.E.2d at 656; *see also S.C. Dep't of Health*, 325 S.E.2d at 314-315.

Judge Lee reviewed the evidence presented at the hearing, listened to the arguments of counsel, and thoughtfully questioned counsel for both parties related to the relevant facts. Thereafter, she took the matter under advisement to ensure that she allotted due consideration to the arguments of both parties. The evidence against the Appellants was overwhelming at that hearing and Judge Lee noted: "I'll look at the information again, but let me tell you. Based on what I've seen and what I've heard, I'm very close to striking your answer. I think that the basic answers tell me nothing. Anyone picking up this file and looking at it, they don't say anything." (Lee Transcript. p. 29, ll. 21-25) Judge Lee late states that she will further consider the matter will give the Appellants the benefit of the doubt: "I'm trying to give you the benefit of the doubt, but two and a half, almost three years down the road, it's very difficult to do that." (*Id.* at p. 31, l. 8.) Thereafter, Judge Lee took the matter under advisement for careful consideration.

Similarly, in *McNair*, the trial court warned the County that it was inclined to strike their answer. *McNair* at 465. In *McNair*, the County still did not comply with the Motion to Compel following the hearing. *Id.* The Court of Appeals determined that the "willful disobedience of previous orders warranted the severe sanction of dismissal." *Id.* at 467. Here, the Appellants not only have continued to fail to comply with Judge Dickson's Order, they also completely disregarded the Order of Judge Lee made at the hearing directing Appellants to produce counsel's list of Bates stamped documents. (Lee Transcript p. 28, ll. 10-16.) The actions of the trial court in *McNair* were upheld by the Court of Appeals and should likewise be upheld in this case.

Following the hearing, Judge Lee took the matter under advisement for several months

before issuing the appropriate sanction of striking the Answers of the Appellants. Her consideration was thorough and reflective of the facts. She clearly used sound discretion based on the facts presented by both sides and made a determination that striking the Answers was the proper sanction for the extreme and flagrant disregard of Judge Dickson's Order. There is no evidence whatsoever that Judge Lee abused her discretion in any way. Thus, her decision must be upheld.

V. JUDGE LEE'S ORDER STRIKING THE ANSWERS OF THE APPELLANTS SHOULD BE AFFIRMED BECAUSE APPELLANTS ADMIT THAT THEY DID NOT, AND HAVE NOT, FULLY COMPLIED WITH JUDGE DICKSON'S ORDER.

Pursuant to Rule 220(c) of the South Carolina Rules of Appellate Procedure, the Court may affirm any order upon any ground(s) appearing in the record. SCRAP 220(c) Throughout the hearing, Appellants' counsel admits that the Appellants have not fully complied with Judge Dickson's Order.[20] Likewise, even in their brief, Appellants admit to "lapses in the production of documents". (App. Brf. p. 15) The Appellants arguments at the Rule to Show Cause hearing and in their Brief are nothing more than their objections to Judge Dickson's original Order Compelling Discovery. However, as Judge Lee noted, the Rule to Show Cause Hearing was not an appeal or a Motion to Reconsider Judge Dickson's prior ruling. Instead, it was purely a determination of whether or not the Appellants had complied with Judge Dickson's Order. By the Appellants' own admissions, they did not fully comply with the Order. (Id.) As such, Judge Lee was required to use her discretion to determine the appropriate sanction. Based on the extent and severity of the disregard of the Order of Judge Dickson, she was well within her discretion to strike the Appellants' Answers. If a party fails to obey an order to provide or permit discovery,

[20] *See supra* p. 9-12.

the trial court may impose sanctions such as striking pleadings:

> **"If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discover, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:**
>
> **(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;**
>
> **(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;**
>
> **(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;**
>
> **(D) In lieu of any of the foregoing orders or in addition thereto, and order treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; . . .**
>
> **In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." SCRCP 37(b)(2)**

In addition to striking the Appellants' Answers, Judge Lee could have also held the Appellants in contempt and also ordered that the Appellants pay the Respondent's expenses and attorney fees related to the failure to comply with Judge Dickson's Order. *(Id.)* Thus, the Appellants' assertions that they were given the "harshest sanction at the court's disposal" is simply false. (App. Brf. p. 17) Judge Lee was within her discretion to strike the Appellants'

Answers, hold the Appellants in contempt, and award the Respondent attorney's fees and costs. She did not impose the harshest sanction at her disposal. Instead, she chose the sanction compatible with open admissions from the Appellants that they did not comply with Judge Dickson's Order, the Rules of Civil Procedure, and the applicable case law. In light of the length of time the discovery was outstanding, the clear evidence that little to no effort was made to comply with Judge Dickson's Order, and the Appellants' dishonesty to the Court, it is clear that the sanction of striking Appellants' Answers was warranted.

The judiciary expects lawyers to police themselves and to participate fairly in the discovery process, but when that ideal is not met, the responsibility for preventing discovery abuse rests on the shoulders of the trial judges. *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 193, 552 S.E.2d 10,18 (2001) It is Judge Lee's duty and responsibility to prevent blatant discovery abuse, as was seen in the conduct of the Appellants. It was within Judge Lee's sound discretion to issue the sanction of striking the Appellants' Answers.

CONCLUSION

The Appellants have acted with willful disobedience and gross indifference to the rights of the Respondent. Their callous disregard of the Order of Judge Dickson, of the Order of Judge Lee, and of the Rules of Civil Procedure warrant a severe sanction. Striking the Answers of the Appellants was the appropriate sanction for their egregious conduct and bad faith toward the Respondent and the tribunal. Our courts have held that the dismissal of an action is warranted in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's

rights. *See Orlando v. Boyd,* 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996).[21]

Defendants were served with discovery from the Plaintiff on September 5, 2014. Now over four (4) years later, and despite a Court Order compelling discovery, the Plaintiff remains without the majority of the information ordered by Judge Dickson and has been substantially prejudiced in the advancement of her case. The failure of the Appellants to produce the documents and information Ordered by Judge Dickson, including even the most basic of discovery responses, is evidence of their on-going bad faith, willful disobedience, and gross indifference to the rights of the Respondent and to the authority of the Court. The sanction of striking the Appellants' answer is clearly warranted in this case and Judge Lee acted within her discretion to order the same.

For the reasons stated herein, this Court should affirm Judge Lee's Order Striking the Answers of All Appellants.

Respectfully submitted,

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September 12, 2018

[21] See also, *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.,* 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App.1999).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED
SEP 17 2018
SC Court of Appeals

Richland County Case No. 2016-CP-40-04463
Court of Appeals Case No. 2018-000924

Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, Respondent,

v.

Sterling Healthcare, Inc., Country Wood Nursing Center, LLC, and Guardian Resources, LLC, Appellants.

PROOF OF SERVICE

I hereby certify that I have this day served a copy of the foregoing INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, with copies of all documents to be included, upon all counsel of record by mailing the same via the United States Postal Service with sufficient postage in a properly addressed envelope to:

Leah Parker, Esquire
Brantley C. Rowlen, Esquire
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Atlanta, GA 30309-3521

This 17th day of September, 2018.

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