THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2018-000385

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased and Jeanette Howe . . . . . Respondents,

v.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC; Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber company; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber industries, Inc.); Cleaver-Brooks, Inc.; Covil Corporation' Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, individually and as successor-in-interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife, Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc, f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.,; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American & Standard Manufacturing

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Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; Zurn Industries, ... Defendants

Of Which Covil Corporation is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, ... Respondents

v.

CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in-interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation.. . . . . Defendants

Of which Covil Corporation is the Appellant.

AND

James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore, Descendant, Respondent.

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.

AND

Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc.,. . . .Defendants

Of which Covil Corporation is the Appellant.

APPELLANT'S FINAL REPLY BRIEF

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Appellant, Covil Corporation ("Covil"), submits this reply brief in further support of its appeal.

RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Respondents' Initial Brief make two assertions that require clarification. First, Respondents state that Covil did not answer James Sizemore's second amended complaint[1]. [Resp'ts' Br. 2]. While this is a correct statement, it is misleading without the proper supporting facts. Second, Respondents assert that Covil had notice that Justice Toal would impose sanctions against it if Covil violated a discovery order. [Resp'ts' Br. 7]. This is not to say that lack of adequate warning is an excuse for any violation of a court order, but Respondents' assertion misstates the facts.

I. Justice Toal struck Covil's pleadings before Respondents filed its second amended complaint.

In Sizemore, Respondent James Sizemore filed a motion seeking leave to file second amended complaint on April 9, 2018, which was granted on May 2, 2018; however, both events occurred well after Covil had filed its notice of appeal. [See R. pp. 426, 429, and 433]. "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. Covil is specifically appealing Justice Toal's Order striking its pleadings. It would be redundant if not belligerent to answer an amended complaint where the trial court has previously struck its pleadings.

1 James Calvin Sizemore v. Bowater Paper Mill, et al., Hampton County Case No.: 2016-CP-25-0440.

II. Respondents mischaracterize Justice Toal's admonishment of Covil's codefendant.

Justice Toal did state that she could impose sanctions, but her comments were directed at a co-defendant who provided a date for deposition but never provided responsive documents. [R. p. 461, lines 15-17]. When questioned by the trial court, the co-defendant stated that the storage methods maintained by the co-defendant precluded production of the documents. [R. p. 460, line 25-p. 461, line 6]. Justice Toal ordered a new deadline set with promise of sanctions if no compliance. [R. p. 463, lines 10-17]. The only notice given to Covil from this admonishment was that willful violations of the rules could result in such severe sanctions. But Justice Toal also stated that sanctions against a party who failed to produce documents would not include precluding them from a summary judgment motion let alone having their answer struck. [R. p. 460, lines 10-21].

In Covil's case, the documents have always been available and have previously been produced to Respondents' counsel on multiple occasions. [R. p. 504, line 17-p. 505, line 6]. Further, Covil informed the court at the January 24 hearing that they would again be produced by the week's end. [R. p. 504, lines 18-21]. Covil again informed the court that, as it had been a defunct business since 1991, the documents would be the exact same. [R. p. 505, lines 1-3]. The threat of sanctions was made against a separate defendant for failing to produce documents at all, not against Covil.

ARGUMENT

I. The Circuit Court erred in sanctioning Covil where no motion for sanctions was filed.

Respondents argue that a judge may issue sanctions *sua sponte* because the language of

Rule 37(a), SCRCP, negates the requirement of a motion for sanctions under Rule 37(b), SCRCP. [Resp'ts' Br. 17]. This is incorrect. The language of Rule 37(a) reads: "[a] party may apply for an order compelling discovery when a deponent fails to answer a question or a corporation fails to make a designation under Rule 30(b)6)." Rule 37(a), SCRCP.[2] Respondents interpret "may" as making any motion unnecessary before sanctions under Rule 37(b) may be imposed. [Resp'ts' Br. 13]. Respondents have misread the Rule. The scope of subsection (b) is broader than subsection (a), as it provides for relief for violations of orders made under multiple rules, including but not limited to, Rule 37(a). Still, in both cases that Respondents cite to as support for this argument, the party seeking sanctions filed a motion. See Karppi v. Greenville Terrazzo Co., Inc. 327 S.C. 538, 541-42, 489 S.E.2d 679, 681 (Ct. App. 1997) (second motion to compel discovery filed after a party refused to attend a deposition as ordered by the court); Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860 ("When Trexler failed to attend a third deposition, Ralphs moved for sanctions under Rule 37(b), SCRCP.").

Respondents argue that the plain language of Rule 37(b), SCRCP, grants the court authority to act upon its own motion in the event of a violation of a court order. [Resp'ts' Br. 16]. There are multiple rules that expressly permit the court to act without a prior motion, but Rule 37(b) is not one of them. Compare Rule 37(b) with Rule 16(a), SCRCP (providing that a court may order the parties to appear for pre-trial matters in its discretion or upon motion); Rule 11(a), SCRCP, (providing that the court, upon motion or upon its own initiative, may impose an appropriate sanction for violations of the Rule); and Rule 53, SCRCP, (providing, in limited circumstances,

2 Respondents argue that, although not required, they complied with this portion of the rule. It is true that a motion to compel was filed, but it was filed on January 23, well before the deposition of James Covil, and made no mention of the sanctions ultimately ordered.

that the court may upon its own motion direct a reference of a case to the Master-in-Equity). Because Rule 37(b) contains no language expressly granting the court the authority to act without a pending motion, sanctions under Rule 37(b) cannot be entered until they are requested by a party in a motion.

> An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 7(b)(1), SCRCP. Generally, a party must move for the court to act before it can grant the requested relief. See Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight, 298 S.C. 241, 244, 379 S.E.2d 724, 726 (Ct. App. 1989) ("Because there were no motions for summary judgment pending at the time of the pre-trial hearing, there was no motion before the court to grant."). In this case, no motion seeking sanctions or even to deem Covil in violation of a court order was ever filed. The parties were in court on January 24 as a result of disagreements as to the discovery process; however, this is not in and of itself a violation. See 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice § 37.05 at 37-100 (2d ed. 1984) (addressing the comparable Federal rule: "In short, if the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expenses of determining the justification of his refusal."). In the Motions to Compel which led to the January 24 hearing, Respondents sought only "an order compelling Covil to (1) produce a 30(b)(6) representative for deposition, (2) to produce fully responsive documents to requests for documents served pursuant to Rule 30(b)(5) of the South Carolina Rules of Civil Procedure attached to the notice of 30(b)(6) deposition." [R. pp. 394,

400, and 420]. In addition, Respondents' prayer for relief included requests that the court order that Covil forfeited its right to go forward with summary judgment motions on February 26th and award Respondents costs and attorneys' fees for bringing the motion. [R. pp. 394, 400, and 420]. This is the fullest extent of any sanctions requested of the court. Even at the hearing, Respondents requested only that the Court preclude summary judgment motions from proceeding. [R. p. 479 line 8-p. 480, line 21].

Respondents asserted, for the first time, that Covil failed to comply with her oral rulings in an email dated February 16, 2018. [R. p. 1066]. Respondents did not state that they had filed a motion to compel nor did they state whether they had sought to remedy any alleged noncompliance outside of court. [Id.]. Respondents did not even request sanctions in their email. [Id.]. Respondents merely informed the court that they had submitted a proposed order "to reflect [Respondents'] understanding of [Justice Toal's] rulings from the 1/24 hearing." [Id.]. In an apparent effort to defend this action, Respondents further stated that a transcript had been included to evidence believed noncompliance and specify the sanctions sought.[3] [Id.].

A trial court may not exceed the scope of the motion nor may it grant relief not sought. Skinner v. Skinner, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972). Our courts have routinely held that motions must specific in the relief sought and the grounds brought before the court. Id.; See also Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992) (finding the trial court erred in denying motion to vacate judgment where the finding was based upon Rule 60(b)(1) but the motion was brought under Rule 60(b)(4)). At least one judge has refused to

3 To the extent Respondents may argue that this lone mention of sanctions reflects a request or motion for sanctions, it must be compared against the second half of the email where Respondents specifically mentioned six other motions to compel and requested hearings for each.

strike pleadings where such a sanction has not been requested. See Paramount Film Dist. Corp. v. Ram, 15 F.R.D. 404, 405 (E.D.S.C. 1954) ("I know of no authority that I have to strike such a defense of my own motion. The defense, therefore, until stricken is valid."). A trial judge's power to amend his or her order only extends to matters which were before the court at the hearing reference in the order. City of N. Myrtle Beach v. Lewis-Davis, 360, S.C. 225, 230, 599 S.E.2d 462, 464 (Ct. App. 2004). As such, the proper procedure would have been for the Respondents to file a motion under Rules 5, 7, and 37 of the South Carolina Rules of Civil Procedure seeking to hold Covil in violation of the any such order. This would present Covil with the opportunity to present its case against such charges. Justice Toal's ultimate, written order concerned matters which occurred well after the hearing for which Covil had no chance to respond.

II. The Circuit Court Erred in Sanctioning Covil Without a Violation of a Court Order.

Evan if the appropriate motion were made, sanctions under Rule 37(b) are not appropriate here because Justice Toal never entered an order on the matter. A trial court cannot impose sanctions under Rule 37(b), SCRCP, unless and until there is an Order of the Court. Downey v. Dixon, 294 S.C. 42, 44 n. 4, 362 S.E.2d 317, 318 n. 4 (Ct. App. 1987) ("The distinction between the [Rule 37(b) and Rule 37(d)] is that there must be an order of the Court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions." (citations omitted)).

Respondents argue that Justice Toal sanctioned the Covil for "its numerous violations of discovery orders." [Resp'ts' Br. 20]. Specifically, Respondents state that these orders are Justice Toal's oral ruling on January 24, 2018, Justice Toal's Scheduling Order entered January 19, 2018, and Judge Hill's standing discovery order. [Resp'ts' Br. 13, 18]. The Order in which

Justice Toal struck Covil's pleadings was titled "Order Regarding Covil Corporation Discovery Motions," signifying that Justice Toal made her ruling based upon Respondents' January 23 Motions to Compel rather than any court order. [R. pp. 62, 65, and 68]. In their February 16 email submitting the proposed order, which Justice Toal signed without changing, Respondents state that the proposed order attached was in light of the January 24 hearing. [R. p. 1066]. Justice Toal specifically cites the Court's January 24 ruling as the order that Covil violated. [R. pp. 62, 65, and 68]. Further, Justice Toal's order makes no mention of her January 19 Order and only tangentially mentions the Standing Discovery Order once. [Id.].

a. The Circuit Court Could Not Have Sanctioned Covil Based on a Violation of Judge Hill's Order Because Covil Did Not Violate Judge Hill's Order.

Respondents state that Covil violated Judge Hill's Order by failing to produce information within 60 days of filing. [Resp'ts' Brief 18.]. This matter was brought before the Court on January 24 by way of Respondents' Motions to Compel dated January 23. [See R. p. 444, lines 1-13]. As noted above, however, this motion sought only to compel disclosure and not to hold Covil in violation of a prior order. [R. pp. 394, 400, and 420]. According to Respondents, Justice Toal ruled that "pointing Plaintiffs to stacks of documents in an office or warehouse did not satisfy the burden of production." [Resp'ts' Br. 18]. Respondents conflate Justice Toal's comments towards co-defendant Aurora Pump with her response to Covil's assertion that further production would be futile. [Compare R. p. 461, lines 7-11 with R. p. 510, lines 2-5 and p. 513, line 12-p. 515, line 5]. At the January 24 hearing, the co-defendant explained that they had not produced any documents because they could not convert their system of reels of film into a transportable format. [R. p. 460, line 25-p. 461, line 6]. Justice Toal explained that

"deliberately having a system that makes it impossible to access anything you've stored is not going to cut it with me." [R. p. 461, line 7].

As for Covil, the reality of the hearing is that Covil explained to Justice Toal that they have given these same documents to Respondents' counsel multiple times. [R. p. 503, line 17-p. 505, line 6]. The offer to "come take a look" was made in an effort to assure Plaintiff's counsel that nothing new had changed since the last time they had produced the immense number of documents. [Id.]. Nonetheless, Justice Toal instructed Covil to turn over the requested documents to Respondents and Covil timely complied. [R. p. 510, lines 2-5; see also R. p. 1026].

b. Justice Toal's Oral Ruling was not a Final Order so as to Warrant Sanctions.

Covil could not have violated Justice Toal's Oral Ruling because Justice Toal did not enter a written order with the clerk of court until February 28.[4] Respondents believe that Justice Toal's oral order became binding immediately and therefore asserts it is the order Covil allegedly violated. [Resp'ts' Br. 18]. South Carolina has long held that an order of the court has no effect until it is written and entered. Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964). In Case, the court took the opportunity to note the connection between the common practice of proposed orders and why an oral ruling is not binding. The Case court explained:

> In South Carolina as a general practice the Judge prepares his own Order or Decree or he may direct the attorneys to prepare the Order or Decree for his approval. It was said in Archer v. Long, 46 S.C. 292, 24 S.C. 83: 'Until the paper has been delivered by the judge to the clerk of the court, to be filed by him as an order in the case it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery. In the case of Genobles v. West, 23 S.C. 160, the circuit judge well says: 'A judgement is the final determination ot the right of the parties in an action. While the written instrument purporting to be the judgment in a

4 All three Orders are dated February 23, 2018, but none were filed by the Clerk of Court's Office until later. The Sizemore Order was filed on February 28; the Falls Order was also time stamped as filed on February 28 but carries an additional time stamp indicating it was refiled on March 2; and the Howe Order was filed on March 1.

> cause remains in the possession of the judge who is to pronounce it, it is of no effect, and like a deed not delivered.

Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964).

Respondents assert that the ruling in Case only provides solution to conflicts between a written order and an oral order. [Resp'ts' Br.17 (citing Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998)]. This assertion misses the point of Parag, which is that a trial judge may modify his or her order at any time until it has been reduced to writing and signed. 333 S.C. at 226, 508 S.C.2d at 592-93 (citing First Union National Bank of South Carolina v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct.App.1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) (no order is final until it is written and entered and the trial judge retains discretion to change his mind and amend his oral ruling accordingly); First Union National Bank of South Carolina v. Hitman, Inc., 308 S.C. 421, 418 S.E.2d 545 (1992) (a judge is not bound by a prior oral ruling and may issue a written order which conflicts with the prior oral ruling)). It is exactly because a judge retains the power to amend his or her oral ruling that the oral ruling cannot be binding.

The South Carolina Rules of Civil Procedure and common practice would change drastically if oral rulings had immediate effect. For example, a judge would not retain the power to amend or revoke his order in the same manner that he or she presently enjoys. See e.g., Bayne v. Bass, 302 S.C. 208, 209, 394 S.E.2d 726, 727 (Ct. App. 1990) ("Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery.").

The time for filing a post-trial motions would begin the moment the judge rules from the bench. See e.g., Rule 59(e), SCRCP.

Indeed, Justice Toal herself has relied upon Case in requiring a final written order. See Johnson v. South Carolina Dept. of Probation Parole, and Pardon Services, 372 S.C. 279, 641 S.E.2d 895 (2007). In Johnson, Justice Toal, writing for the Supreme Court, affirmed the Court of Appeals' refusal to review the merits of an action where the record including a full transcript of the hearing before the trial court, including the trial court's oral ruling but did not contain a final, written order. Id. at 284, 641 S.E.2d at 897 ("As both court rule and this Court's precedent provide, a judgment is effective only when reduced to writing and entered into the record."). The following year, the Court of Appeals applied Case to orders on motions and specifically declined to find that a trial judge's pronouncements from the bench should have immediate, final, and binding effect. Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008). There, the Court of Appeals held that even where a trial judge has orally recused himself he retained the power to rule on a motion to reconsider where his oral grant of recusal was not reduced to writing and signed. Id. at 451-52, 669 S.E.2d at 346.

Announcement of judgment in open court merely constitutes "rendering" of judgment, not entry of judgment. Kirby Building Systems v. McNiel, 327 N.C. 234, 239–40, 393 S.E.2d 827, 830 (1990), reh'g denied, 328 N.C. 275, 400 S.E.2d 453 (1991). "To render judgment means to pronounce, state, declare, or announce judgment. Rendering judgment is not synonymous with entering . . . the judgment. Judgment is rendered when [the] decision is officially announced, either orally in open court or by memorandum filed with [the] clerk." Id. (internal citations and quotations omitted). The general rule is that a court speaks only through its written orders and

not through its verbal decisions. 56 Am. Jur. 2d Motions, Rules, and Orders § 56 (2018). South Carolina's existing case law tends to support this view. See Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The final written order contains the binding instructions which are to be followed by the parties.").

In this case, Justice Toal issued instructions from the bench on January 24. [R. p. 510, lines 2-5]. In those instructions, Justice Toal included a request that Covil draft a proposed order for her signature. [Id.]. Instead, Respondents sent Justice Toal a proposed order via electric mail. [R. p. 1026]. Not only is the act of submitting an unrequested proposed order a violation of Justice Toal's instructions, the content of the proposed order violated her instructions. [Id.]. It was this very act that created the confusion that caused a month-long delay in Justice Toal's rulings from the bench becoming a written and final order. Therefore, any oral ruling made on January 24 had no binding effect until it was reduced to writing and entered by the clerk of court, which occurred over a month later.

c. Covil complied with Justice Toal's Oral Ruling.

Assuming Justice Toal's Oral Order made on January 24, 2018, was binding, Covil complied with that order. Justice Toal made a ruling as to Covil on three matters: (1) to produce the requested documents by January 26, 2018; (2) to produce Jim Covil for deposition under Rule 30(b)(6), SCRCP; and (3) counsel for appellant to draft the proposed order. [R. p. 510, lines 2-8]. By mutual agreement announced to the Judge on the record, the parties agreed to extend the document production deadline to January 29. [R. p. 513, line 21-p. 514, line 18]. Covil complied with the new deadline and submitted proposed orders on January 29.[5] [R. p. 1029].

5 Despite Appellant's compliance with the deadline, Respondent emailed Justice Toal on Tuesday, January 30,

Respondents submitted proposed orders as well but did not copy counsel for Covil to their proposal. In that email, Respondents candidly stated that their orders contained matters "not explicitly addressed at the hearing . . ." [R. p. 1028]. Once Covil became aware of this correspondence it responded and stated its objection. [R. pp. 1026-27]. Covil also noted that Respondents threatened another defendant with motions for sanctions, indicating an understanding that such a motion is required. [Id.].

Despite Covil's compliance with the production deadline and Respondents' noncompliance with the requirement that Covil draft the proposed order, the bulk of Respondents' argument centers on the knowledge of Appellant's 30(b)(6) witness. In its brief, Respondents assert that Covil failed to comply with Rule 30(b)(6) because it failed to testify as to matters known or reasonably available to the corporation. [Resp'ts' Br. at 14]. Rule 30(b)(6), SCRCP, provides that a corporate representative "shall testify as to matters known or reasonably available to the organization." Here, Covil's witness acted as the party representative by necessity. Jim Covil is the only person known to anyone who could ably participate in the deposition. [R. p. 505, lines 16-25]. Sanctions are appropriate under the rule where the corporation intentionally designates a witness who is not knowledgeable about the relevant facts. Rule 30(b)(6), SCRCP. Sanctions, especially such drastic ones, are not appropriate when the only witness available is unable to remember events from decades ago.

The underlying dispute that led to the hearing as to 30(b)(6) depositions is that Respondents sought to depose the same witness at multiple times about 24,000 documents concerning 75 job sites across five decades. [Resp'ts' Br. 8]. In a normal setting, this is a significant undertaking

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stating that Appellant had yet to produce all of the documents. [1/30/18 Email and Attachments, R.__].

for any witness; however, as Covil explained to the court, the only possible witness that could perform the duty of the deposition was not privy to most matters sought in the notice. [R. p. 507, lines 18-19]. Justice Toal responded that she understood that he may not know any of the information Respondents sought. [R. p. 507, line 20]. In ordering Jimmy Covil to appear for a deposition, the court stated, "I think it's very reasonable for you to say . . . he doesn't know anything . . ." [R. p. 508, lines 2-3]. Based on the representations made to Justice Toal at the hearing as to the level of knowledge that Jim Covil, or anyone else, would have regarding the noticed information, it would have been effective for Justice Toal to clearly outline the requirements being imposed upon Covil. See Welchel v. Boyter, 260 S.C. 418, 421, 196 S.E.2d 496, 497 (1973) ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do and the language of the commands must be clear and certain rather than implied."). Burnell v. Burnell, 359 S.C. 361, 366, 597 S.E.2d 24, 26 (Ct. App. 2004).

Nonetheless, Respondents submitted a proposed order and transcript casting Jim Covil's lack of knowledge as a willful disobedience of the court. [R. p. 1065;]. This representation was made to Justice Toal despite Jim Covil making multiple statements about his efforts to familiarize himself with the immense amount of information. [R. p. 613, lines 7-9 ("I did search through the file cabinets and look through them. And I did look. I was given some other documents also."); R. p. 725, lines 6-7 ("I've researched that one, and we found no information on that."); R. p. 796, lines 11-12 ("We did various word searches, but I don't know if Bowater came up pertaining to that.")].

It is incorrect to say that Jim Covil did not try. The reality is that Respondents did not get

the information they wanted despite knowing Jim Covil did not have that information. Everyone in attendance at the January 24 hearing knew that he would not. [R. 508, lines 1-3]. Still, Respondents seek to set the standard for compliance at producing detailed records and reports made from 24,000 documents covering 75 job sites with every answer the Respondent wants, all the while knowing that Jim Covil had no personal knowledge of any of the matters and would only have his father's 1977 deposition as guidance. Any order from Justice Toal to that effect, made from the bench or with the pen, effectively set Covil up to fail.

III. The Circuit Court erred in sanctioning Covil because Covil was not afforded due process.

Justice Toal's Order rules upon matters which occurred after the January 24 hearing. If, between January 24 and February 16, Covil did anything alleged by Respondents to be a violation of any discovery order, Respondents should have filed a motion with the court requesting a hearing the matter. The drastic nature of the order heightens the need for fair opportunity. It is true a trial judge may amend her ruling at any time, but a judge may not amend an order to rule upon matters occurring after the hearing that were never brought before the court. City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 224, 230, 599 S.E.2d 462, 464 (Ct. App. 2004) ("It is an error of law for a court to decide a case on a ground not before it.").

Recently, the Court of Appeals held that a dismissal of an action requires notice and hearing. See Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC, 423 S.C. 611, 615, 815 S.E.2d 780, 782 (Ct. App. 2018), reh'g denied (July 18, 2018) ("The record discloses no action of the court authorizing the Form 4 dismissal, much less after notice and hearing, as due process required."). Respondents assert that "Covil could and did appear at a hearing where Covil was

permitted extensive time to present its rationale for not complying with the orders to produce requested documents and a Rule 30(b)(6), SCRCP, witness." [Resp'ts' Br. 21]. This is misleading. This refers to the January 24 hearing, at which point neither party had broached the striking of pleadings. Covil could and did appear at the January 24 hearing to respond to Respondents' allegations. It could not, however, respond to as yet unmade requests. Assuming Covil violated a binding court order, it must be afforded notice of a request for relief so that it may respond. Indeed, one sentence in a proposed order submitted to the court via email is not due process.

IV. Justice Toal abused her discretion in imposing such harsh sanctions where less severe alternatives existed warranting reversal.

Even if it was totally proper to sanction Covil, despite all of the above, the sanction chosen by Justice Toal is an abuse of discretion. "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. Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). The imposition of sanction that results in default or dismissal is "harsh medicine that should be administered lightly." Karppi v. Greenville Terrazzo Co., Inc. 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." Id. In her Order, Justice Toal merely stated the standard for considering these factors but did not actually include any evidence that they were ever actually considered.

Additionally, the trial court must not go beyond the necessities of the situation to foreclose

a decision on the merits of a case. Karppi, 327 S.C. at 547, 489 S.E.2d at 684 (Anderson, J., concurring). In Judge Anderson's concurrence in Karppi, he examined the myriad examples of alternative and less harsh sanctions available to the trial court. There, he outlined four cases where an appellate court has expressly rebuked severe sanctions when alternative remedies are available. Id. at 548-50, 489 S.C.2d at 685-86.

In one medical malpractice case, Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996), the plaintiffs failed to abide by a scheduling order for their expert witness' deposition. Our Supreme Court found that the trial judge abused his discretion when he ruled that the plaintiffs could not use that particular doctor as their expert at trial and denied the request to name and depose another expert. In another, Ball v. Canadian American Express Co., 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994), the Court of Appeals found a finding of contempt appropriate where counsel for the defendant "freely admitted his clients had refused to comply with discovery orders before a certain take and had still not complied with certain discovery requests by the time of trial." In a third, Downey, 294 S.C. 42, 362 S.E.2d 317, the Court of Appeals found a $50 fine to be too lenient a sanction for a party's failure to answer interrogatories or attend a deposition; nevertheless, the Court of Appeals expressly refused to exclude a witness at the new trial and stated that "exclusion of a witness is a sanction which should never lightly be invoked." Finally, Judge Anderson noted that the Fourth Circuit has examined Rule 37(b) of the Federal Rules of Civil Procedure to provide a 'more narrow' range of discretion when the court imposes sanctions that result in default. Wilson v. Volkswagen of Am., 561 F.2d 494, 503 (4th Cir. 1977), cert. denied, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978).

In a case strikingly similar to the one at issue, the District Court for the District of Maryland

recognized that the state of the business for whom the corporate representative shall testify is an important factor to consider, and where that business is no longer active leniency should be given to the 30(b)(6) deponent. See Weintraub v. Mental Health Authority of St. Mary's, Inc., 2010 WL 347882 (D. Md. 2010).

In Weintraub, the defendant sought a protective order from the court after being served a Rule 30(b)(6), FRCP, notice. The defendant argued that it is essentially a defunct corporation without employees or authorized representatives. Id., at *1. The defendant confirmed that a former corporate director could be found but stated that "he or she would have no information about the topics upon which Plaintiff wishes to examine the corporation." Id. The court ordered the defendant to nonetheless designate an individual for testimony and comply with the plaintiff's request. After the defendant designated a former employee who was neither knowledgeable nor prepared for the deposition, the plaintiff filed motion to show cause and motion to compel. Id. The court granted the motion and sanctioned the defendant five hundred dollars, noting that the chosen witness was a "poor choice." Id. The court conceded that the defendant's poor choice was a product beyond the control of the parties. In explaining the sanction of five hundred dollars, the court stated:

> Considering also that [defendant] had dismissed its workforce and was in the process of winding down its business at the time the deposition was taken, a measure of lenity is called for. While the court by no means excuses [defendant's] noncompliance, these circumstances likely presented significant challenges to preparing the corporate designee for deposition.

Id. Of course, even Weintraub can be distinguished from the case at bar because: (1) the court entered a written order; (2) the plaintiff in Weintraub actually filed a motion to show cause after the defendant failed to comply with the order; and (3) the business was still in

the process of winding down and could locate former employees with personal knowledge. Unlike Weintraub, the Court had not yet entered an order in this case, Respondents failed to make any appropriate motion, and Covil has been out of business since 1991. These differences exemplify the need for lenity noted by the Weaintrab court.

In another case concerning the 30(b)(6) deponent of a defunct business, the District Court for the District of Massachusetts stated:

> In this case, because [the defendant] is defunct, there are few witnesses available to testify on behalf of the company. However, if, after reviewing all information known or reasonably available to the company, the [30(b)(6) deponents] still would not be able to testify as to some of the 30(b)(6) topics and there were no other available witnesses who could do so, [the defendant] should have so informed [the plaintiffs] well in advance of the scheduled depositions.

Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., 201 F.R.D. 33, 38 (D. Mass. 2001). In Calzaturficio, the court found the appropriate sanction to be effectively hitting the reset button, requiring the plaintiffs reissue notices to the defendants and requiring the defendants to review all of the available documents and notify the plaintiffs well in advance of the deposition of any topics where the witness nor anyone else could respond. Id.

Conclusion

For the foregoing reasons, Covil respectfully requests that this Court reverse the trial court, order that the Subject Orders be vacated, and remand these actions for further proceedings consistent with this Court's rulings.

Dated this 6th day of December, 2018.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2018-000385

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased and Jeanette Howe . . . . . .
Respondents,

v.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC; Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber company; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber industries, Inc.); Cleaver-Brooks, Inc.; Covil Corporation' Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, individually and as successor-in-interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife, Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc, f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.,; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp; Viking Pump, Inc.; Warren Pumps LLC; Yuba

Heat Transfer Corporation; Zurn Industries, ... Defendants

Of Which Covil Corporation is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, ... Respondents

v.

CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in-interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation.. . . . . Defendants

Of which Covil Corporation is the Appellant.

AND

James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore, Descendant, Respondent.

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.

AND

Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South

Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc.,. . . .Defendants

Of which Covil Corporation is the Appellant.

CERTIFICATE OF COUNSEL

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

December 6, 2018.

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