RECEIVED
DEC 14 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2018-000385

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

vs.

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; AW. 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 Boe 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

vs.

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; CNA 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, Decedent,.....Respondent.

vs.

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. 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.

FINAL BRIEF OF RESPONDENTS

Renee M. Melancon (admitted *pro hac vice*)
Jonathan M. Holder
DEAN OMAR BRANHAM, LLP
300 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Theile B. McVey
John D. Kassel
KASSEL MCVEY ATTORNEYS AT LAW
P.O. Box 1476
1330 Laurel Street
Columbia, SC 29201

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE ISSUE

Under 37 of the South Carolina Rules of Civil Procedure, trial courts have discretion to sanction parties when they violate discovery orders. Finding that Covil Corporation had violated discovery orders, Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, Retired, acting as Circuit Court Judge, ordered that Covil's pleadings be struck. Did Justice Toal act within her discretion in sanctioning Covil for its multiple discovery violations?

STATEMENT OF THE CASE

There are three underlying lawsuits in this case; they are brought by the heirs of family members who contracted and died from mesothelioma as a result of exposure to asbestos-containing insulation installed and supplied by Appellant Covil Corporation, a large insulation installation and supply company. The underlying case of each is as follows.

I. Wayne Howe was exposed to and died from asbestos from Covil's asbestos-containing insulation.

In March 2015, Wayne Howe was diagnosed with malignant pleural mesothelioma. [R. pp. 224-25]. On November 9, 2015, Mr. Howe and his wife Jeanette brought this action against Covil. [R. pp. 189-223]. Over three months later, on February 8, 2016, Covil filed an answer. [R. pp. 226-42]. Wayne died from mesothelioma, and on September 23, 2016, his son, Timothy, individually and as personal representative of the estate of Wayne Howe, deceased, and Jeanette Howe filed a first amended complaint. [R. pp. 243-70]. On October 10, 2016, Covil filed an answer to the first amended complaint. [R. pp. 273-91].

II. Charlotte Smith was exposed to and died from asbestos from Covil's asbestos-containing insulation.

On May 7, 2015, Charlotte Smith was diagnosed with mesothelioma. [R. p. 103]. On July 20, 2015, Ms. Smith and her husband Gary brought this action against Covil. [R. pp. 72-104]. Nearly

two months later, on September 10, 2015, Covil filed its answer. [R. pp. 105-18]. Ms. Smith passed away from metastatic mesothelioma, and on March 10, 2016, Gary Smith filed a First Amended Complaint individually and as personal representative of the estate of his wife. [R. pp. 119-48]. Covil did not file an answer.

When Gary Smith passed away, on November 15, 2017, the Smith's daughter, Roxanne Falls, filed a Second Amended Complaint individually and as personal representative of the estate of Mrs. Smith. [R. pp. 149-69]. On December 8, 2017, Covil filed a second answer. [R. pp. 170-88].

III. James Calvin Sizemore was exposed to and died from asbestos from Covil's asbestos-containing insulation.

On December 9, 2016, James Calvin Sizemore brought this action against Covil for his mesothelioma. [R. pp. 292-321]. Over two months later, on February 17, 2017, Appellant filed an answer. [R. pp. 322-37]. After Mr. Sizemore died from mesothelioma, on February 1, 2018, his son, James Coleman Sizemore, filed a first amended complaint as personal representative of James Calvin Sizemore. [R. pp. 338-67]. On February 15, 2018, Covil filed an answer to the first amended complaint. [R. pp. 368-82]. James Coleman Sizemore filed a second amended complaint on April 9, 2018. Covil filed no answer to the second amended complaint.

IV. Plaintiffs gave their depositions regarding their exposure to Covil's asbestos-containing insulation.

Early in the litigation, Plaintiffs provided ample evidence, including their own depositions, detailing how and where they were exposed to Covil's asbestos-containing material.

Mr. Howe was deposed for three days in January and February, 2016. [R. p. 400]. In November and December, 2016, two of Mr. Howe's coworkers were deposed, providing further information about Mr. Howe's exposure. [R. p. 402 n.1].

Mr. Sizemore was deposed over a period of 10 days in September and October, 2016. [R. p. 421].

Ms. Smith's former husband was deposed for two days in December 2015. [R. 396]. Ms. Smith died before she could give her deposition. [R. p. 396].

V. The case is governed by a Master Discovery/Scheduling Order.

On October 13, 2010, D. Garrison Hill, the circuit judge appointed by the South Carolina Supreme Court to preside over the South Carolina Asbestos Master Docket, held a hearing under Federal Rule of Civil Procedure 26(f) and entered a Master Discovery/Scheduling Order, which applies in all pending and future asbestos related personal injury cases. [R. pp. 41-48]. The Order requires that responses to Standard Requests for Production are due within 60 days of the filing of the case. [R. pp. 2-3]. In particular, defendants such as Covil are obliged to produce information regarding job sites at which Plaintiffs were employed and at which defendants sold and/or distributed products containing asbestos. [R. pp. 41-43].

The Master Discovery/Scheduling Order cautions that, "[t]he parties acknowledge that this Court has the power to impose such sanctions pursuant to its inherent power and the South Carolina Rule of Civil Procedure and common law as it deems appropriate in the event of any failure of any party to comply with the provisions of this order." [R. p. 6].

VI. Justice Toal schedules a hearing to address discovery issues and issues a Scheduling Order governing, inter alia, discovery issues.

As discussed below, Covil was not cooperating with discovery in the three subject cases. On January 11, 2018, Justice Toal set a date for a hearing to cover, *inter alia*, discovery disputes in these three cases. [R. pp. 50, 55, 60]. The court also ordered that "Depositions of Defendants' 30(b)(6) Representatives for whom a properly served Notice of Deposition has been issued must

be completed by February 9, 2018." [R. pp. 51, 56, 61]. As finally relevant to this appeal, the court ordered that "[a]ppropriate responses to all properly issued Deposition Subpoenas Duces Tecum must be provided by February 2, 2018." [Id.].

Justice Toal set the hearing to cover discovery issues for January 24, 2018. [Id.]. Instead of taking the opportunity of nearly two weeks between the date the hearing was set on January 11, 2018 and the date of the hearing itself on January 24, 2018 to engage in good faith discovery, on January 19, 2018 Covil filed motions for protective order and motions to quash the Rule 30(b)(6) deposition notices. [R. pp. 383-93]. Plaintiffs were forced to file motions to compel. [R. pp. 394-425].

VII. Plaintiffs file motions to compel.

On January 23, 2018, Plaintiffs filed motions to compel. [R. pp. 394-425].

The *Howe* Plaintiffs explained that they had served three deposition notices and document requests between November13, 2017 and January 9, 2018. [R. p. 402]. Plaintiffs were clear from the beginning that the time, date, and location could be moved to accommodate Covil. [Id.]. Despite having over two months to respond, as of January 23, 2018, Covil had not provided a deposition date for its corporate representative or for the date requested and had not provided any responsive documents. [R. p. 403].

In the *Falls* matter, Plaintiffs twice requested relevant documents and amended the notice to request a corporate representative deposition by February 4 or 5, 2018. [R. p. 396]. Covil never responded to these requests. [Id.].

The *Sizemore* Plaintiff explained that he had served a deposition notice on December 3, 2017, setting a deposition almost two months out, and had requested responsive records by January 4, 2018. [R. p. 421]. Again, Plaintiff offered to cooperate in accommodating Covil with

respect to time, date, and location. [Id.]. As of January 23, 2018, Covil still had not provided an agreeable date for a deposition or provided any responsive documents. [Id.]

Each motion requested the court (1) to compel Covil to produce requested documents and provide dates to complete the depositions in January 2018, which depositions were to occur in February 2018; (2) to rule that Covil has forfeited its right to go forward with motions for summary judgment if these conditions are not met; and (3) to award costs and attorney's fees attendant to the motions to compel as provided by Rule 37, SCRCP. [R. pp. 396-97, 403-04, 422].

VIII. Justice Toal holds a hearing on all discovery disputes.

On January 24, 2018, Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, Retired, acting as Circuit Court Judge, presided over a hearing regarding discovery disputes in these three actions. Plaintiffs explained that they had served Covil with deposition notices as early as November 2017. [R. p. 502, lines 6-10]. This gave Covil much more than the requisite 30 days after the service of summons and complaint, as provided by Rule 30, SCRCP. [Id., lines 15-18]. Plaintiffs explained that Covil had initially proposed to go forward with its deposition on January 31, 2018, but as Plaintiffs prepared for that date, Covil reversed course and claimed that it needed more time because its witness had started a full-time job. [Id., lines 10-14]. Covil then claimed that Plaintiffs did not need another deposition as they should be satisfied to rely on a deposition of Covil's initial company president taken in *1977*. [R. p. 502, line 24 – p. 503, line 1].

Covil's current corporate representative, James P. Covil, started with Covil in 1974, and is the son of Palmer Covil, who started the company and was deposed in 1977. [R. p. 502, lines 19-25]. Plaintiffs explained that they did not seek to cover ground already explored in the 1977

deposition, but that since James Covil worked for the company after the 1977 deposition, during years when Plaintiffs' testimony implicated Covil insulation, Plaintiffs may have questions for him regarding worksites not at issue in the 1977 deposition. [R. p. 503, lines 5-12]. Covil argued to the judge that James Covil would have nothing new to add; the court acknowledged that Covil was entitled to make that claim, but that Plaintiffs were equally entitled to depose him in the first place. [R. p. 507, lines 10-15].

Plaintiffs also explained that deposing Covil's corporate representative on the issue of insurance was crucial. [R. p. 503, lines 13-22]. It was initially represented to Plaintiffs that Covil was uninsured. [Id.]. Later, however, Plaintiffs learned that Covil did in fact have insurance during the relevant years, and Plaintiffs needed to depose Covil's corporate representative on this matter in order to better evaluate the case. [Id.].

Plaintiffs made two requests. First, Plaintiffs requested that Covil's deposition proceed on January 31, 2018, as Covil had initially proposed. [R. p. 503, lines 23-24]. Second, Plaintiffs requested that Covil be ordered to produce responsive documents by week's end, which would have been January 26, 2018. [R. p. 503, line 24 – p. 504, line 3]. The court ordered that the deposition would occur February 7, 2018, [R. p. 510, lines 4-5], which is the date that Covil proposed at the hearing [R. p. 505, line 11]. The court initially ordered production of documents by Friday, January 26, 2018, which date was extended to the following Monday by agreement of the parties. [R. p. 510, lines 3-4; R. p. 514, lines 9-19].

During that same hearing, Justice Toal admonished Covil's co-defendant that "there's certainly a precedent for striking pleadings when no documents are produced and when the production request is of a long-standing and the trial date and the depositions are set." [R. p. 463,

lines 14-17]. This is precisely the situation here, and Covil was thus on notice of the court's willingness to exercise her discretion to strike pleadings as required.

Meanwhile, the court initially instructed Covil's counsel to draft a proposed order that Covil would produce its documents by January 26, 2018 and would produce a representative for deposition by February 7, 2018. [R. p. 510, lines 2-8]. Later in the hearing, however, the parties agreed that Covil would produce its documents by a later date, January 29, 2017, agreed that the parties would work out the timing of the deposition, and added agreement regarding the motions for summary judgment. [R. p. 513, line 21 – p. 514, line 25]. Both parties prepared proposed orders in an effort to reflect these later agreements.

IX. Each party prepares a proposed order.

The parties' proposed orders were different in two substantive respects: First, Plaintiffs' proposed order suggested that the corporate representative deposition commence by February 9, 2018 and continue day to day until complete, [R. pp. 1020, 1022, 1024], whereas Covil's proposed order suggested that its corporate representative's deposition would occur on February 7 or 8, 2018, [R. p. 1016]. Second, Plaintiffs' proposed order, for the clarity of the parties and the court, specified which locations were at issue for each case. [R. pp. 1020, 1022-23, 1024].

When Covil objected to Plaintiffs' proposed order, Plaintiffs explained that either proposed order was in line with the court's rulings. [R. p. 1028, lines 1-2]. Plaintiffs pointed out that they had consolidated notices for three cases spanning five decades and involving over 75 locations. [Id. lines 8-9]. Covil had produced over 24,000 pages of documents before Plaintiffs submitted their proposed orders. [Id., line 9]. Further, Plaintiffs made clear that they hoped to finish Covil's deposition in one day, but they offered to continue the deposition a second day, at Covil's convenience, as long as it met the court's deadline. [Id., lines 10-11]. Accordingly,

Plaintiffs submitted to the trial court that they believed their proposed order was in line with the court's order. [Id., lines 12-13]. Covil sent a rebuttal email and proposed order. [R. pp. 1026-27, 1043-44]. Thereafter, the court's clerk sent the parties the following:

> The purpose of the hearing was to expedite and streamline these matters. As of now, it seems these discovery issues have only been complicated. The judge is not particularly pleased with the contention regarding these matters. Therefore, if there are any disagreements as to the proposed orders submitted by the parties that were told to provide proposed orders, then the opposing party can send in their own proposed order. Judge Toal will look at both proposed orders and make a decision as to what the orders will contain. No need for any further back and forth which will only serve to delay their process and thus delay the cases for trial.

[R. p. 1026].

Plaintiffs and Covil suggested to the court that the parties do away with the proposed orders and rely on the transcript of the hearing. [R. p. 1032]. The clerk indicated, however, that it was preferable for both sides to send a proposed order. [R. p. 1030]. Plaintiffs had already submitted a proposed order, but they had not yet deposed Covil's corporate representative, which occurred as follows.

X. Plaintiffs depose James Covil.

On February 7 and 8, 2018, Plaintiffs deposed Covil's corporate representative, James P. Covil. Even though he was called to testify as a Rule 30(b)(6) corporate representative, Mr. Covil had made no effort to familiarize himself with the issues listed in the deposition notices.

Mr. Covil recalled no search of Covil records to find out how often Covil was at the jobsites identified by Plaintiffs. [R. p. 1092, lines 7-20]. Even though Covil and Duke Power had a long-lasting relationship over many years, Mr. Covil made no effort to review Covil's records for its work at Duke Power locations. [R. p. 1092, lines 14-25]. Even though Mr. Covil knew that Covil had a relationship with Daniel as a subcontractor or insulation products supplier,

he made no effort to discern the connection between the companies at any of the job sites listed by Plaintiffs. [R. p. 1095, lines 2-10].

For each and every jobsite listed, Mr. Covil admitted he made no effort to research and evaluate Covil's involvement at that facility, including for example, Cliffside Steam Plant [R. p. 1094, lines 4-11], General Electric Power System and Gas Turbine in Greenville [R. p. 1096, lines 10-17], Wright's Manufacturing [id., lines 10-11], Bolan Machine & Manufacturing [id., lines 12-13], Halter Marine [R. p. 1097, lines 14-15], Brunswick Nuclear Generation Station [id., lines 16-18], Saucer Marine Services [id., lines 19-20], Cape Industry Chemical Plant in Wilmington [R. p. 1097, line 21 – p. 1098, line 1], several Exxon facilities [R. p. 1099, lines 12-21], International Paper and Riegelwood Paper Mill in Southport [id., lines 23-25]. Further, Mr. Covil made clear that even when he said that he was "not familiar" with a certain company, he had simply made no effort to see if that company was in Covil's files. [R. p. 1098, lines 2-15].

Mr. Covil was similarly unforthcoming with respect to Covil's insurance, a topic Plaintiffs had specifically identified during the hearing as one on which they needed to depose Covil. Mr. Covil admitted that he did not look for any insurance policy during a relevant time frame. [R. 1107, lines 6-18]. What records were available dated to the 1940s, 1950s, and early 1960s, and were difficult to discern, yet Mr. Covil made no effort to contact Covil's broker, the Goldsmith Agency, for clarification. [R. p. 1108, line 12 – p. 1109, line 13]. Mr. Covil had "no idea" whether Covil had coverage for its work at the jobsites identified by Plaintiffs. [R. p. 1112, lines 16-20].

XI. Plaintiffs submit proposed orders following the deposition of James Covil and pursuant to the court's order.

Shortly after Mr. Covil's deposition, the judge's clerk again requested proposed orders arising out of the January 24, 2018 hearing on any issue that had not become moot. [R. p. 1053]. On February 16, 2018, in light of Mr. Covil's failure to comply with Rule 30(b)(6), SCRCP, during his deposition as well as the clerk's instruction, Plaintiffs filed proposed orders regarding Covil Corporation Discovery Motions. [R. p. 1065-66, 1080-1114]. Plaintiffs pointed out that the deposition of Mr. Covil demonstrated that Covil made no effort to ascertain what was available to the company regarding Covil's insurance policies at issue or even the locations identified in Plaintiffs' notices of deposition. [R. pp. 1065-66]. Plaintiffs further pointed out that Covil had failed to produce a witness to discuss what was known to the company regarding the location and nature of its work as an insulation supplier and contractor, which information was sought in the deposition notices as well as in the court's standard discovery order. [R. p. 1066]. In short, Covil had failed to comply with the court's orders, even though trial was quickly approaching, as it was set for March 12, 2018. [Id.]. Plaintiffs explained that Covil's intransigence at this late date prevented the parties from preparing for trial. [Id.]. As a result, Plaintiffs requested that the court (1) strike Covil's pleadings, and (2) order Covil to produce a witness who had researched what insurance coverage existed for the company for deposition by March 2, 2018. [R. p. 1082].

XII. Covil is afforded two more times to submit a proposed order.

On February 16, 2018, after Plaintiffs had submitted their proposed orders, the judge's clerk asked that any defendant who disagreed with Plaintiffs' proposed orders submit their own proposed order within 24 hours. [R. p. 1209]. Later that afternoon, the clerk afforded defendants yet more time, until February 21, 2018, to submit a proposed order. [R. p. 1206]. The court explained that no further hearing would be had, although the parties could make any arguments in writing by February 21, 2018. [R. p. 1239]. The clerk noted, "The judge would like to reiterate

that many of these issues are in regards to 30(b)(6)s that are routine and should not create so much dispute." [Id.].

Covil submitted a lengthy "explanatory letter" setting forth its position on the proposed orders. [R. pp. 1048-49]. Covil chose not to submit a new proposed order, relying instead on the proposed order it had submitted after the January 24, 2018 hearing. [R. pp. 1048-52].

Justice Toal cautioned all parties that she "will consider sanctions for failure to abide by the Rules of Discovery and my orders." [R. p. 1280].

XIII. The trial court strikes Covil's pleadings.

On February 23, 2018, after ample time for the parties to submit proposed orders and argument—both oral and written—in support thereof, the judge's clerk notified the parties that "we have been able to sort through all of the proposed orders and objections in regards to the disputed discovery issues from the January 24th hearing." [R. p. 1277]. The court signed the proposed orders submitted by Plaintiffs on February 16, 2018. [R. pp. 62-70]. The court sanctioned Covil for its repeated discovery abuses and flouting of multiple orders in this case.

The court explained that at the January 24, 2018 hearing, she had ordered Covil to produce documents requested in Plaintiffs' 30(b)(6) notice by January 29, 2018, and to produce a witness by February 9, 2018 to discuss the noticed topics based on what was known or reasonably available to the company. [R. pp. 62, 65, 68]. Having reviewed portions of the deposition of James Covil, however, the court found that Covil "made no effort to ascertain what was available to the company regarding multiple locations identified in Plaintiff's notice." [Id.]. In addition, the court found that "a reasonable effort to ascertain insurance coverage and limits for the company was not made despite a properly noticed deposition request." [Id.]. The court continued:

> Defendant has failed to produce a witnesses to discuss what is known to the company regarding the location and nature of its work as an insulation supplier and contractor. This information was sought in the corporate representative deposition notice as well as in this Court's Standing Order Discovery. Defendant repeatedly failed to produce relevant and requested information. Thereafter, Defendant failed to comply with this Court's order on January 24, 2018. Trial is set for March 12, 2018. The failure to produce records prevents the parties from preparing for trial. Plaintiff alleges injuries as a result of exposure from insulation. Defendant is an insulation contractor who failed to comply with this Court's order to ascertain what is known or reasonably available to the company about the location of its work. As such, the court will strike Defendant's pleadings.

[R. pp. 63, 66-67, 69].

STANDARD OF REVIEW

In another case that examined the issue of whether a trial court had abused its discretion in striking an answer, the appellate court outlined the standard of review as follows:

> 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). This court will not interfere with that decision unless the trial court abused its discretion. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985). An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). The court went on to describe situations—such as here—that might be found not to be an abuse of discretion: "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. Rule 37(b)(2)(C), SCRCP." This is just such a case.

ARGUMENT

I. The trial court did not abuse its discretion by striking Covil's pleadings.[1]

[1] This section responds to sections I and III of Covil's argument.

The trial court identified two grounds for supporting her ruling: Covil's failure to provide the information sought in the corporate representative deposition notice (as required by the January 24, 2018 ruling as well as Rule 30(b)(6), SCRCP) and the Master Discovery/Scheduling Order.

A. Covil violated an order issued by Justice Toal on January 24, 2018.

Covil's first argument ignores the governing Rule 37, SCRCP which provides the method for a court to impose sanctions for failure to comply with a discovery order. Justice Toal properly applied that method here.

First, a party "may" apply for an order compelling discovery. Rule 37(a), SCRCP. Although this step is, by its plain language, not mandatory, it was satisfied here, when Plaintiffs filed their motions to compel on January 23, 2018. [R. pp. 394-425]. Each motion requested the court (1) to compel Covil to produce requested documents and provide dates to complete the depositions in January 2018, which depositions were to occur in February 2018; (2) to rule that Covil has forfeited its right to go forward with motions for summary judgment if these conditions are not met; and (3) to award costs and attorney's fees attendant to the motions to compel as provided by Rule 37, SCRCP. [R. pp. 396-97, 403-04, 422]. This condition was reiterated when Plaintiffs argued the issue at the hearing. [R. p. 503, line 23 – p. 504, line 3; p. 508, line 25 – p. 509, line 4].

The court granted the motions to compel, ruling that Covil must produce their documents to Plaintiffs by January 26, 2018 (which deadline the parties extended by agreement), and ruling that Covil's deposition would take place on February 7, 2018. [R. p. 509, lines 2-5]. The court emphasized that she was not going to preclude Plaintiffs from taking the deposition of Covil's corporate representative: "I'm not going to forbid [Plaintiffs] from taking a 30(b)(6) of the

person that is still around to be deposed, the son." [R. p. 507, lines 10-12]. Justice Toal issued this order notwithstanding Covil's representation of when its corporate representative had worked at the company, his knowledge, and his availability. [R. p. 506, lines 1-2]. She issued this order with knowledge of Plaintiffs' position that information regarding Covil insurance was critical. [R. p. 503, lines 16-22].

Rule 30(b)(6), SCRCP, provides that a corporate representative "shall testify as to matters known or reasonably available to the organization." Covil utterly violated this Rule by failing to testify as to matters reasonably available to the organization, and in so doing violated the court's order that Covil provide a deposition. Shortly after Covil's deposition, the judge's clerk requested proposed orders [R. p. 1053], which Plaintiffs filed in light of Covil's lack of cooperation during its deposition, [R. pp. 1065-66, 1080-1114]. Plaintiffs pointed out that Covil made no effort to ascertain what was known or reasonably available to the company regarding locations identified and nature of its work, which information was sought in the deposition notices and in the Master Discovery/Scheduling Order, which has been in effect since 2010. [R. pp. 1065-66]. In short, Covil had failed to comply with the court's January 24, 2018 order. [R. p. 1066]. Plaintiffs pointed out that Covil's failure to comply with the court's order at this late date prevented the parties from preparing for trial and requested that the court (1) strike Covil's pleadings, and (2) order Covil to produce a witness who had researched the company's insurance coverage. [R. p. 1082].

Covil maintains that Justice Toal "never made an oral ruling regarding what amount of knowledge, if any, James Covil was required to have at his deposition." Covil's Br. at 24. There is no such requirement. A party testifying as a corporate representative "shall testify as to matters known or reasonably available to the" corporation. Rule 30(b)(6), SCRCP. On February 23,

2018, Justice Toal rightly found that Covil had not met its obligation, and in particular had not responded to Plaintiffs' questions regarding Covil's insurance. [R. pp. 62-70].

The court agreed with Plaintiffs' position and granted sanctions under Rule 37(b)(2), SCRCP:

> (2) Sanctions by Court in Which Action Is Pending. 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 discovery, 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:
>
> . . .
>
> (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;. . .

SCRCP 37(b)(2) (emphasis added).

Covil attempts to distract from the clearly applicable Rule under which the trial court issued her sanction by claiming that the court could sanction Covil's behavior only upon a motion by Plaintiffs. The plain language of the Rule makes no such requirement. A motion is not required: "Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order or, upon motion, for a party's failure to respond to certain discovery requests. Rule 37(b)(2)(C) & (d), SCRCP." Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542, 489 S.E.2d 679, 682 (Ct. App. 1997); see also Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860, at *2 (S.C. Ct. App. Mar. 24, 2005) (same).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). It is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233,

509 S.E.2d 261 (1998) (citations omitted). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. at 233, 509 S.E.2d at 262 (*citing* Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Here, the plain language of Rule 37(b), SCRCP, under which the trial court sanctioned Covil, does not require a prior motion. Rather, a party "may apply for an order compelling discovery," which Plaintiffs did in this case. Rule 37(a), SCRCP (emphasis added). In contrast, other statutes under which a court may impose a sanction only upon receipt of a motion state so explicitly. See, e.g., In re Beard, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (requiring motion for Rule 11 sanctions); Pool v. Pool, 329 S.C. 324, 326, 494 S.E.2d 820, 821 (1998) (requiring motion for sanction under South Carolina Frivolous Civil Proceedings Sanctions Act); Rule 37(d), SCRCP ("the court in which the action is pending on motion may make such orders in regard to the failure as are just." (emphasis added)).

Further attempting to detract from the ruling, Covil claims that the January 24, 2018 order was not effective until written. An oral order is not without effect, as an oral order is subject to the control of the judge until it is written. Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964). The rule does not provide that an oral ruling is without effect; it simply provides that to the extent the written order may conflict with the prior oral ruling, the written order controls. Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998). No such conflict has been shown here.

Here, the February 23, 2018 written orders, which sanctioned Covil for failing to comply with the discovery rules, did not conflict with the January 24, 2018 oral orders, which ordered Covil to comply with the discovery rules. Accordingly, failure to comply with the written order does not absolve Covil of failing to comply with the oral ruling.

Finally, Covil's reliance on Rule 58(a)(2), SCRCP is misplaced, as that rule pertains to the entry of judgments, which is necessary for appellate court review. That was not the case for the court's ruling at the discovery hearing.

B. Justice Toal properly sanctioned Covil under the Master Discovery/Scheduling Order.

Rule 37(b)(2), SCRCP, provides that a court may sanction a party that fails to obey an order entered under Rule 26(f), SCRCP. The court sanctioned Covil under its Master Discovery/Scheduling, which applies in all pending and future asbestos related personal injury cases. [R. pp. 1-48]. Covil violated the Standard Requests for Production, which are due within 60 days of the filing of the case. [R. pp. 2-3]. In particular, Covil is obliged to produce information regarding job sites at which Plaintiffs were employed and Covil sold and/or distributed products containing asbestos. [R. pp. 41-43]. The cases of Mr. Howe, Ms. Falls, and Mr. Sizemore were filed on November 9, 2015, July 20, 2015, and December 19, 2016, respectively. [R. pp. 72, 189, 292]. Yet by January 23, 2018, Covil still had not produced responsive documents. [R. pp. 394, 400, 420]. Covil attempted to argue that it had offered Plaintiffs to go "take a look" at Covil's office, [R. p. 504, lines 13-16], but Justice Toal ruled that pointing Plaintiffs to stacks of documents in an office or a warehouse did not satisfy Defendant's burden of production, [R. p. 461, lines 7-11].

The Master Discovery/Scheduling Order cautions that, "[t]he parties acknowledge that this Court has the power to impose such sanctions pursuant to its inherent power and the South Carolina Rule of Civil Procedure and common law as it deems appropriate in the event of any failure of any party to comply with the provisions of this order." [R. p. 6]. Justice Toal was well within her discretion in sanctioning Covil's misconduct.

C. Justice Toal properly sanctioned Covil for violation of the Scheduling Order.

On January 19, 2018, Justice Toal issued a Scheduling Order setting motion deadlines. [R. pp. 49-61]. The Order provided that Rule 30(b)(6), SCRCP, depositions must be completed by February 9, 2018, and appropriate responses to properly issued deposition subpoena duces tecum must be provided by February 2, 2018. [Id.]. Here, although James Covil's deposition occurred the two days before the scheduling order deadline, he failed to comply with the rules by testifying as to matters "known or reasonably available to the" corporation. Rule 30(b)(6), SCRCP. Rule 27(b)(2) provides that a sanction may be issued "[i]f 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 discovery. . ." This, too, is a ground for sanctioning Covil.

D. Justice Toal did not abuse her discretion.

As set forth above, a sanction may be issued based on violation of a Rule 30(b)(6) or failure to obey an order entered under Rule 26(f). Rule 37(b)(2), SCRCP. Covil erroneously insists that a motion is required. Even if a motion were required, Covil complains that Plaintiffs' motions did not specifically request the sanction issued by the court. There is no requirement that the court is constrained to impose only the sanction that a party seeks. By its plain terms, Rule 37, SCRCP, grants the court the discretion to impose one of at least six rules as it sees just: "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. . . ." Rule 37(b)(2), SCRCP. By the plain language of Rule 37, SCRCP, Covil's position fails.

Even indulging Covil's argument, the cases cited by Covil are distinguishable insofar as they do not involve the discretion afforded by Rule 37(b), SCRCP, and do not involve sanctions in the first place. E.g., Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972) (pertaining to court's order on family law, not sanctions); Tryon Fed. Sav. & Loan Ass'n v. Phelps, 307 S.C. 361, 361, 415 S.E.2d 397, 398 (1992) (pertaining to foreclosure, not sanctions); Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 35, 260 S.E.2d 708, 709 (1979) (notice provided in personal injury action; sanctions not at issue); Wesley-Burke v. Wesley-Burke, 288 S.C. 28, 339 S.E.2d 512 (1986) (divorce action; sanctions not at issue); In re Shier's Estate, 35 S.C. 417, 14 S.E. 931, 931 (1892) (probate action; sanctions not at issue); State v. Parker, 7 S.C. 235, 235 (1876) (white collar crime, sanctions not at issue); Coogler v. California Ins. Co. of San Francisco, Cal., 192 S.C. 54, 5 S.E.2d 459, 460 (1939) (venue issue; sanctions not at issue); Wildhagen v. Ayers, 225 S.C. 384, 82 S.E.2d 609 (1954) (nonsuit of personal property; sanctions not at issue).

The similar is true of the cases Covil cites for the erroneous proposition that it was reversible error for Justice Toal to sign and enter the sanctions. See App. Br. at 20-21. That is, Covil relies on cases on which a motion was explicitly required by the governing rule. See, e.g., Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992) (motion to vacate default judgment under Rule 60, SCRCP); City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 228, 599 S.E.2d 462, 463 (Ct. App. 2004) (ruling in contravention of Tort Claims Act's statute of limitations); Bass v. Bass, 272 S.C. 177, 179, 249 S.E.2d 905, 906 (1978) (claim for

compensation required even under liberal construction of family court rules); Turbeville v. Floyd, 288 S.C. 171, 341 S.E.2d 651 (Ct. App. 1986) (summary judgment). These cases do not change the result here: Justice Toal properly sanctioned Covil for its numerous violations of discovery orders. As the underlying orders properly granted relief, there was no error of law. Covil's abuse of discretion claim fails.

II. The trial court did not violate Covil's due process rights.

The Supreme Court of South Carolina has explained the concept of due process:

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). *Due process does not mandate any particular form of procedure.* South Carolina Ports Authority v. Kaiser, 254 S.C. 600, 176 S.E.2d 532 (1970). Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985); Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

S.C. Nat. Bank v. Cent. Carolina Livestock Mkt., Inc., 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (emphasis added).

Covil complains that it was denied due process because it did not get to argue repeatedly before the judge in person. Even after the May 24, 2018 hearing, Covil had multiple meaningful opportunities to argue its position, including in direct response to Plaintiffs' proposed order striking Covil's pleadings.

Covil had numerous meaningful opportunities to be heard. Covil could file responses to Plaintiffs' Notices of Motion and Motions to Compel. 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. [R. p. 504, line 5 -

p. 508, line 8, p. 509, line 12 – p. 510, line 1]. Covil then sent a proposed order to Justice Toal and objections to Plaintiffs' proposed orders. [R. pp. 1016-17, 1026-27, 1043-45].

Even after Covil chose not to comply with the court's order to tender a witness who would fully comply with the requirements of Rule 30(b)(6), SCRCP, the court gave Covil three additional times to be heard. First, after James Covil's February 7-8, 2018 deposition, Justice Toal again requested proposed orders arising out of the January 24, 2018 hearing. [R. p. 1053]. Second, on February 16, 2018, after Plaintiffs had submitted their proposed orders, the judge's clerk asked that any defendant who disagreed with Plaintiffs' proposed orders submit their own proposed order within 24 hours. [R. p. 1206]. Third, Justice Toal afforded defendants yet more time, until February 21, 2018, to submit a proposed order. [R. pp. 1068 & 1239]. The court explained that no further hearing would be had, although the parties could make any arguments in writing by February 21, 2018. [R. p. 1239]. She cautioned that "many of these issues are in regards to 30(b)(6)s that are routine and should not create so much dispute." [Id.].

Covil took advantage of its opportunity, submitting a lengthy "explanatory letter" setting forth Covil's position on the proposed orders. [R. pp. 1048-49]. For its own strategic reasons, Covil chose not to submit a new proposed order, relying instead on the proposed order it had submitted after the January 24, 2018 hearing. [R. pp. 1050-52]. In short, Covil had and took advantage of "the opportunity to be heard at a meaningful time and in a meaningful manner." S.C. Nat. Bank v. Cent. Carolina Livestock Mkt., Inc., 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (citation omitted).

Covil misleading cites a number of cases for the proposition that sanctions striking pleadings or entering default judgment have been found to involve the deprivation of a protected interest under the due process clause. Each case is readily distinguishable from the current case,

or flatly contradictory. For example, contrary to Covil's citation, Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), in fact held that the sanction of taking certain facts as established may be applied to support a finding of personal jurisdiction over the defendant without violating the due process clause, but risking default judgment. Similarly, in RDLG, LLC v. Leonard, 649 F. App'x 343, 351 (4th Cir. 2016), the court held that "the district court's decision to enter default judgment as a sanction did not violate Leonard's right to due process." The Eleventh Circuit, in another case cited by Covil, likewise ruled against Covil's position: "Because the district court did not grant a default judgment against EMC and Musallam on the issue-preclusion issue, and, by considering the merits, effectively did not strike Appellants' issue-preclusion defenses as a sanction, the due-process claim here lacks any basis." Axiom Worldwide, Inc. v. Excite Med. Corp., 591 F. App'x 767, 775 (11th Cir. 2014). Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 210 (1958) involved whether due process was violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order; such inability is not at issue here. State ex rel. McLeod v. Brown, 278 S.C. 281, 284, 294 S.E.2d 781, 782 (1982), also cited by Covil, is entirely distinguishable, as in that case the court granted summary judgment to one party and dismissed sua sponte the action against all other respondents—with no notice to them.

In short, the cases upon which Covil relies do not support its position. Covil had multiple opportunities to have the judge hear its position with respect to Plaintiffs' motion and proposed order. To the extent that Covil is asserting that Justice Toal violated its due process rights because it was not permitted multiple in-person hearings, such an argument has no basis. "The essential requirements of due process . . . are notice and an opportunity to respond. The

opportunity to present reasons, *either* in person *or* in writing, why proposed action should not be taken is a fundamental due process requirement." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, (1985) (emphasis added). Here, Justice Toal tendered Covil ample opportunity to set forth its position at the hearing and in multiple subsequent briefing invitations. Such written submissions were an adequate means to resolve the dispute; multiple in-person hearings were not required by due process. Id.

III. Covil's conduct involved bad faith, willfulness, or gross indifference to Plaintiffs' rights.

Covil's proposition that Justice Toal's ruling was an abuse of discretion is without support. Covil repeatedly shirked the court's discovery orders. This is behavior so reprehensible that the legislature has established a separate rule for issuing sanctions against it. Rule 37, SCRCP.

"Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998). 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). "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. Rule 37(b)(2)(C), SCRCP." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

Several factors are considered in determining whether and what sanction is appropriate. "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 Service Equip. Mfg. Co., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). There is no requirement that the court recite such "magic words" as "bad faith" or "gross indifference," as Covil expects here, particularly where the circuit court's finding is tantamount to such. Cf. McClurg v. Deaton, 395 S.C. 85, 96, 716 S.E.2d 887, 893 (2011) (refusing to require certain "magic words" where "our courts have never before required such explicit language").

First, with respect to the precise nature of the discovery and the discovery posture of the case, "[t]he 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, 495 S.E.2d 213 (Ct. App. 1997). Here, Covil engaged in a pattern of willful failure to engage in discovery, commencing with failure to turn over key documentation leading to failure to prepare its corporate representative for deposition on topics that Covil knew were crucial to Plaintiff's trial development. Moreover, since Covil drug its feet, its Rule 30(b)(6) deposition was not held until February 7-8, 2018, while trial was scheduled to commence on March 12, 2018, leaving Plaintiffs no time to prepare.

Covil's conduct leading so close to trial made it impossible for Plaintiffs to prepare for trial and maintain their action against Covil. Covil's gamesmanship prevented full and fair disclosure and made preparation for trial a "guessing game." Stymying a party's ability to prepare for trial is the ultimate prejudice. Striking Covil's pleadings was the only logical sanction. "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial." Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). "Where these rights are not accorded, prejudice must be presumed and, unless the party who has

failed to submit discovery can show a lack of prejudice," sanctions must be imposed. Id. Without adequate sanctions, discovery procedures would be ineffectual. Id. As a result, over leniency must be avoided. Id.

In addition to the precise nature of the discovery and the discovery posture of the case, Covil's willfulness weighs in favor of the sanction Justice Toal imposed. Covil exhibited a pattern and practice of willfully disregarding its duties under the Rules of Discovery by ignoring Plaintiffs' attempts to engage in discovery and Plaintiffs' offers to modify dates and locations as needed. As a result, Plaintiffs were forced to file motions to compel.

The *Howe* Plaintiffs explained that they had served three deposition notices and document requests starting in November 13, 2017. [R. p. 401]. As of January 23, 2018, Covil had not provided a deposition date for it corporate representative nor any responsive documents. [R. p. 402]. In *Falls*, Plaintiffs twice requested relevant documents and requested a corporate representative deposition. [R. p. 395]. Covil never responded. [Id.]. The *Sizemore* Plaintiff explained that he had served a deposition notice on December 3, 2017, setting a deposition almost two months out, and had requested responsive records by January 4, 2018. [R. p. 421]. Covil did not provide an agreeable date for a deposition nor any responsive documents. [Id.]

It was not until Justice Toal ordered the Rule 30(b)(6) deposition that Covil finally capitulated to it. Even then, having been apprised of the discovery topics since late 2017, Covil's corporate representative was utterly unprepared to testify as to a single one of the sites where Plaintiffs had reason to believe that Covil had installed or supplied asbestos. Moreover, Covil had been put on notice during the January 24, 2018 hearing that Plaintiffs were particularly interested in Covil's insurance history, [R. p. 503, lines 13-22], yet again, Covil's corporate representative was unprepared to discuss that matter. Under Rule 30(b)(6), SCRCP, witnesses

have an obligation to testify as to matters "known or reasonably available to the organization," and all litigants have an obligation to obey the court's discovery orders. Covil's ongoing disregard of the discovery rules and Justice's Toal's orders were nothing short of willful and in bad faith.

Covil contends that the trial court failed to make a meaningful determination that Covil's conduct involved bad faith, was willful, or involved gross indifference to the Plaintiffs' rights. On the contrary, the trial court explained that her rulings took into account such factors as "willfulness," which she described as follows:

> The deposition of Jim Covil demonstrates that the company made no effort to ascertain what was available to the company regarding multiple locations identified in Plaintiff's notice. Additionally, a reasonable effort to ascertain insurance coverage and limits for the company was not made despite a properly noticed deposition request. . . . Defendant has failed to produce a witness[] to discuss what is known to the company regarding the location and nature of its work as an insulation supplier and contractor. This information was sought in the corporate representative deposition notice as well as in this Court's Standing Order Discovery.

[R. pp. 62-63, 65-66, 68-69].

Upholding prior sanctions in the form of striking of pleadings, the appellate court has previously rejected appellants' claims that the "the trial court did not consider the severity of the sanction when he ordered Appellant's pleadings struck." QZO, Inc. v. Moyer, 358 S.C. 246, 257, 594 S.E.2d 541, 548 (Ct. App. 2004). Here, the court specifically considered Covil's "willfulness" and listed its failures to comply with her orders and the rules of discovery. The court was well aware of the scope of the sanction she found necessary to issue.

Justice Toal's ruling was well within her discretion as well as similar rulings by other courts. For example, in Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999), as here, the court struck the defendant's

answer for noncompliance with orders including those governing production of documents and Rule 30(b)(6), SCRCP, depositions. Id., 334 S.C. at 197-98, 511 S.E.2d at 718. As here, the defendant in Griffin had failed to meaningfully comply with prior orders and had received a warning of the consequences if the defendant failed to comply with the court's order. Id., 334 S.C. at 199, 511 S.E.2d at 719. The court distinguished Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), upon which Covil relies, which found that the trial court's striking of a defendant's answer was unduly harsh, especially because of the profound effect it had on the co-defendant to the litigation. Here, as in Griffin, the only party punished is the Appellant, "the party who clearly and willfully committed the misconduct." Id., 334 S.C. at 199, 511 S.E.2d at 719.

Griffin and QZO are far from the only cases in which South Carolina courts have been open to striking pleadings. See, e.g., Davis v. Parkview Apartments, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (upholding dismissal where appellants' failure to comply with the court order was willful, caused unnecessary delay, and prejudiced respondents); Barnette v. Adams Bros. Logging, 355 S.C. 588, 595, 586 S.E.2d 572, 576 (2003) (holding the circuit court did not abuse its discretion by dismissing one of the plaintiff's actions "[g]iven [plaintiff's] persistent refusal to comply with the trial court's orders"); McNair v. Fairfield County, 379 S.C. 462, 464-67, 665 S.E.2d 830, 832133 (Ct. App. 2008) (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to produce documents requested, coherently organize the documents produced, and provide complete responses to interrogatories); Halverson v. Yawn, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884-85 (Ct. App. 1997) (affirming court's order striking complaint because plaintiff failed to comply with the court's order to comply with discovery and presented no evidence showing she complied with the order).

The most compelling case Covil can dig up is Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990), in which the court struck the defendant's counterclaim where its interrogatory responses arrived by U.S. mail a few hours late. Apparently the sanction in that case was a misunderstanding, as the sanctioning judge misunderstood that a prior judge ordered the defendant sanctioned if it did not comply with the discovery order. A closer reading of the prior order revealed that the second judge did not have to sanction the defendant. Thus, Balloon Plantation does not, as Covil claims, stand for the proposition that a court must explain why a lesser sanction would not suffice. In short, Covil has failed to carry its burden of showing the trial court abused its discretion.

That the Court could have this power and would impose this sanction for Covil's failure to comply with these orders can come as no surprise. Covil abridged orders that had been entered in a Master Discovery/Scheduling Order in 2010. [R. pp. 1-48]. That Order required, *inter alia*, that responses to Standard Requests for Production would be due within 60 days of the filing of the case. [R. pp. 2-3]. Moreover, defendants such as Covil are obliged to produce information regarding job sites at which Plaintiffs are employed and at which defendants sold and/or distributed products containing asbestos. [R. pp. 41-43]. To leave no doubt about the consequences of the failure to abide by this order, it provided that "[t]he parties acknowledge that this Court has the power to impose such sanctions pursuant to its inherent power and the South Carolina Rule of Civil Procedure and common law as it deems appropriate in the event of any failure of any party to comply with the provisions of this order." [R. p. 6]. Justice Toal further put all defense counsel, including Covil, on notice, during the January 24, 2018 hearing, when she cautioned that "there's certainly a precedent for striking pleadings when no documents

are produced and when the production request is of a long-standing and the trial date and the depositions are set." [R. p. 463, lines 14-17]. This is precisely the situation here.

Again citing Balloon Plantation, Covil bombastically maintains that the sanction here was not merely a rifle shot or a shotgun blast, but a hydrogen bomb. In issuing a sanction, "the judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990). Justice Toal is no doubt aware of this maxim, and aware of where Covil lies between a mouse and a dragon, which is why she properly exercised her discretion in issuing the sanction that she did.

Dated: ~~September 28~~, 2018
December 14

Respectfully submitted,

Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
P O Box 1476
Columbia, SC 29202-1476
803-256-4242
803-256-1952 (Facsmile)

Renee M. Melancon (admitted *pro hac vice*)
DEAN OMAR BRANHAM, LLP KASSEL
300 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990
rmelancon@dobllp.com

Counsel for Respondents