STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, KDP II, LLC, and KRA Development, LP, Respondents. In Re: Cape Charles, Phase I	Docket No. 15-ALJ-07-0369-CC **ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

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SC Court of Appeals

This matter was previously before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Compel or, in the Alternative, to Strike or Exclude Evidence (Motion) filed by Petitioner South Carolina Coastal Conservation League (Coastal) on October 17, 2018, after the contested case hearing had already been held in this case. In its Motion, Coastal sought to compel the production of documents that it argued were responsive to its discovery request and which Respondents KDP II, LLC, and KRA Development, LP (collectively, KDP) improperly withheld. Alternatively, Coastal sought to strike or exclude testimony from KDP expert Dr. Travis Folk. Coastal maintained KDP's failure to produce such discoverable evidence in accordance with the rules resulted in extreme prejudice to Coastal.

In an order dated January 22, 2018, this Court denied Coastal's Motion. Thereafter, on February 5, 2018, Coastal filed a Motion for Reconsideration. In its Motion for Reconsideration, Coastal requests the Court reconsider and clarify its order denying Coastal's Motion "pursuant to SCALC Rule 29(D) and SCRCP Rule 59(e)."[1] Coastal contends that this court "did not directly address and issue a ruling" on its Motion and reasserts its previous contention that "KDP withheld

[1] SCALC Rule 29(D) governs motions for reconsideration in contested cases before this Court. It provides "[a]ny party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP . . . ." Rule 59(e), SCRCP, governs motions to alter or amend judgment. Rule 59(e), SCRCP, provides that the motion "shall be served not later than 10 days after receipt of written notice of the order."

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additional communications between itself and Travis Folk despite [Coastal's] request for such documents during pre-trial discovery." Coastal further contends that its Motion was "straightforward"[2] in seeking a determination about:

> 1) whether the Respondent KDP II, LLC and KRA Development LP ("KDP") committed a discovery violation by failing to produce relevant, non-privileged and responsive materials during pre-trial discovery as required by the rules, and
> 2) the appropriate sanction for such discovery violation.

In its January 22 Order, the Court made every effort to address the issues raised by Coastal in its Motion. Indeed, the Court considered each of the *Jumper*[3] factors in the context of Coastal's argument when it assessed Coastal's motion to strike or exclude. Furthermore, as explained by

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[2] Although Coastal asserts its request was "straightforward," the Motion suggests otherwise. The Court notes that in the Motion, Coastal does not specifically ask the Court to find that KDP violated discovery rules. Rather, the Motion moves for an order compelling the production of documents while simultaneously asserting that the failure to produce was prejudicial to Coastal and prevented it from fully and adequately preparing for trial. Although the Court can infer from Coastal's Motion that it was requesting a finding of a discovery violation by its allegation of prejudice, there is no "straightforward" request for the Court to find a discovery violation in the Motion. Further, Coastal was unclear in its Motion whether it was also moving this Court to re-open the record. Specifically, Coastal stated in the Motion that "counsel believes said discoverable documents may warrant the League filing a motion to re-open the Record." Then, later in the Motion to Compel, Coastal requested that the Court:

> (1) enter an order compelling the improperly withheld discovery and *entertain a motion to re-open the record based on the withheld discovery*, or (2) exclude or strike the testimony of Travis Folk due to KDP's willful failure to produce discovery and the prejudice to the League in not being afforded its rights under Rules 26-32, SCRCP.

(emphasis added). These two statements are not "straightforward" as, on one hand, Coastal is asking to receive discovery it believes was withheld and, on the other hand, stating that its request "may" lead to a motion to reopen the record that has yet to be made.

In addition, the only time Coastal used the word "sanction" in its Motion was within the context of a parenthetical following a citation to *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). While striking a witness's testimony is a possible sanction for a discovery violation, Coastal never explicitly framed its request to strike in this way in its Motion. The closest it got to an explicit request was in its Reply to KDP's response to its Motion, when it asked that:

> the Court impose appropriate sanctions, including but not limited to, costs and reasonable attorneys' fees for the necessity of filing its motion to compel pursuant to Rule 37, SCRCP. Alternatively, the testimony of Folk should be excluded or stricken.

Accordingly, Coastal's request was not "straightforward" and regardless of whether Coastal was asking that the Court to compel testimony, to impose costs and reasonable attorneys' fees, or to strike Dr. Folk's testimony, this Court believed that by explaining that the Motion was unfounded, the obvious inference was that there was no need to grant any sanctions. The Court reiterates that its determination was made in the context of a discovery motion which was filed almost two months after the hearing on the merits and which was filed without a motion to allow the record to remain open or to re-open it after trial.

[3] *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001) (providing a trial judge must consider and evaluate the following factors when determining whether impose the sanction of exclusion of a witness: (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party).

this Court, although Coastal asserts it suffered extreme prejudice, when the Court offered it a means to cure that prejudice, Coastal refused. The Court found, in part, that offering the cure was more reasonable than delaying a trial that had been pending for a significant period. Therefore, the prejudice that Coastal now claims is prejudice of its own creation.

Further, in its Order, this Court explained that KDP did not commit a discovery violation in its answer to Coastal's interrogatory regarding Dr. Folk. The Court found Coastal should not have been surprised by Dr. Folk's testimony because, although the word "threatened" may be a legal term of art in the context of the Endangered Species Act, in the context of the factual testimony in this case, it did not have that restricted meaning. Nonetheless, as noted above, this Court offered a cure to Coastal, which it refused. Specifically, the Court offered Coastal the opportunity to take Dr. Folk's deposition on several occasions. Coastal initially agreed to take his deposition during the weekend break of the case. Surprisingly, Coastal did not take the deposition even though it had asked the Court to sequester Dr. Folk during related testimony from Dr. Whit Gibbons because it intended to depose Dr. Folk.

Then, well after the close of the record, Coastal filed its Motion and claimed that Dr. Folk's testimony during the hearing revealed KDP did not sufficiently disclose the nature of Dr. Folk's testimony. This Court did not find Dr. Folk's testimony to be an unfair surprise because Coastal initially chose not to take his deposition after KDP timely disclosed him as an expert and Coastal refused to depose him after the Court offered it the opportunity to do so on numerous occasions during trial. Moreover, in a response to Coastal's Motion, KDP offered additional communications between counsel for KDP and Dr. Folk that had not been previously provided to Coastal and which explained Dr. Folk's references to communications with KDP's counsel during his testimony. Even though that information should have been disclosed, the Court reviewed the additional communications and determined the content of the communications was not such that the withholding was prejudicial or even surprising. Thus, this Court found that KDP overcame the presumption of prejudice that emanated from its limited oversight in withholding the communications.

Although the Court believes the explanation above–which was set forth in much more detail in its Order–sufficiently addressed the reasons for not granting sanctions, Coastal is correct

that the Court never explicitly ruled regarding the need for sanctions. The Court will therefore address that issue.[4]

The Court does not find that sanctions are warranted. The reasoning for this determination is reflected, in part, in a case Coastal cited in its Motion for Reconsideration as support for this Court imposing sanctions.[5] In *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), Ms. Downey served interrogatories on counsel for Mr. Dixon asking that they state what acts of hers they were relying on to support the allegations contained in their answer. *Id.* at 44, 362 S.E.2d at 317. She also served a notice for taking Mr. Dixon's deposition on counsel for Mr. Dixon. *Id.* at 44, 362 S.E.2d at 318. However, Mr. Dixon's counsel did not respond to her interrogatories and Mr. Dixon failed to attend the deposition. *Id.* at 44, 362 S.E.2d at 317-18. Ms. Downey thus moved for an order striking his answer or, in the alternative, for an order refusing to allow him to testify at the trial of the case. *Id.* at 44, 362 S.E.2d at 318.

Counsel for Mr. Dixon "did not offer any excuse for their failure to respond to the interrogatories of Ms. Downey or for the failure of Mr. Dixon to attend the deposition except to say that he had 'never been able to get with the respondent, William M. Dixon.'" *Id.*. The lower court nonetheless allowed the testimony of Mr. Dixon and fined Mr. Dixon $50.00. *Id.* The South Carolina Court of Appeals (Court of Appeals) found that such a minimal fine for such a blatant refusal to comply with discovery would do "no more than minimally enrich the county tax coffers. The rights of discovery provided by the Rules were not protected in any way." *Id.* at 45, 362 S.E.2d at 318. Thus, the Court of Appeals found the sanction imposed by the lower court was not "a meaningful deterrent to those who might fail to submit to discovery in the future." *Id.*; *see also Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997) ("Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery.").

Here, unlike counsel for Mr. Dixon in *Downey*, KDP did not refuse to answer interrogatories or refuse to allow Dr. Folk to attend a deposition. Rather, it simply did not answer

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[4] In addressing this issue, the Court does not recognize that a party has the right to file such motions as Coastal filed here. See SCALC Rule 29(D); Rule 59, SCRCP.

[5] It is notable that Coastal only cited two cases in support of its initial Motion: *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009) and *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982). However, in its reply to KDP's response, it cited three other cases. It is those three other cases it now cites again in its Motion for Reconsideration.

an interrogatory with sufficient clarity to satisfy Coastal.[6] Moreover, even if KDP failed to properly supplement it interrogatory, a party's failure to supplement a discovery response is not sufficient to support a request to exclude a party's expert witness. *See Barnette v. Adams Bros. Logging*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (finding the late disclosure of expert witnesses where no intentional misconduct was manifest did not warrant the exclusion of the experts' testimony). A proper sanction under this view would have been to charge KDP with the cost of the deposition, or at least the cost of expediting its transcription. However, Coastal never made this request and, by failing to take the deposition after informing the Court it would do so, it foreclosed that potential sanction.

Furthermore, the Court of Appeals' reasoning regarding the prejudice to Downey adds further insight into the resolution of this matter. The Court of Appeals found that though Downey was not surprised by the testimony, there was no evidence that she knew what Dixon was going to say when he testified. Recognizing the "abiding maxim" that a successful trial lawyer should be prepared, the Court of Appeals found that Downey was prejudiced because she was foreclosed from achieving that preparation when Dixon refused to comply with Downey's discovery request. *Downey*, 294 S.C. at 46, 362 S.E.2d at 319. But here, after the purported deficiency was discovered, it was Coastal who chose not to comply with that abiding maxim.

This Court's denial of Coastal's Motion and its Motion for Reconsideration does not discount or ignore the fact that "[t]he gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App.2003). It simply also recognizes that counsel cannot utilize the rules of discovery as a sword when counsel fails to apprehend the nature of a discovery response or an opposing party does not sufficiently supplement its responses. In this case, that lesson is even more pertinent because, after being given repeated opportunities to engage in further discovery to cure the issue complained of, Coastal chose to seek the extraordinary remedy of excluding the relevant testimony of an expert rather than the cure. If the Court allowed Coastal to prevail in excluding Dr. Folk's testimony, they would be rewarded

[6] The Court notes that Coastal was upset with the specificity of the disclosure after discovering that its assumption about the meaning of the word "threatened" within the disclosure was incorrect and having made a calculated decision not to depose Dr. Folk based upon its erroneous assumption.

for refusing to cure the issue of which they are now complaining. Moreover, by failing to take the deposition, Coastal was the author of its own prejudice, if any. Therefore,

ORDER

IT IS ORDERED that Coastal's request for sanctions is **DENIED**.

IT IS FURTHER ORDERED that Coastal's remaining contentions of Court error in its Motion for Reconsideration are **DENIED.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

February 28, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

February 28, 2018
Columbia, South Carolina