THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the Ninth Circuit

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000671

Tammy C. Richardson ..... Respondent

v.

Halcyon Real Estate Services, LLP and McCabe, Trotter & Beverly, P.C. ..... Defendants

Of whom McCabe, Trotter & Beverly, P.C. is the ..... Appellant

INITIAL BRIEF OF APPELLANT

M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 (29401)29401
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

and

Robert P. Wood, Esq.
Joshua R. Hinson, Esq.
ROGERS TOWNSEND & THOMAS, PC
P.O. Box 100200
Columbia, SC 29202
(803) 771-7900

Counsel for Appellant McCabe, Trotter & Beverly, P.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

STATEMENT OF ISSUES ON APPEAL

I. ***Does this Court possess jurisdiction to hear this appeal?***

SUGGESTED ANSWER: ***Yes.***

II. ***Did the trial judge err in finding that Plaintiff's counsel complied with S.C.R. Civ. P. 30(j)(8) where he did not specifically identify documents he planned to use in depositions at least two days in advance, but rather generally referenced all the many thousands of documents produced in discovery?***

SUGGESTED ANSWER: ***Yes.***

III. ***Did the trial judge err in finding that Defendant's counsel violated S.C.R. Civ. P. 30(j)(8) by privately meeting with client to discuss documents not identified by Plaintiff's counsel and instructing witnesses not to answer questions about such private meetings?***

SUGGESTED ANSWER: ***Yes.***

IV. ***Did the trial judge err in finding that Defendant's counsel violated S.C.R. Civ. P. 30 by failing to explain reasons for interrupting deposition and meeting with witnesses?***

SUGGESTED ANSWER: ***Yes.***

V. **Did the trial judge err in imposing sanctions on Defendant?**

SUGGESTED ANSWER: ***Yes.***

VI. ***Did the trial judge err in finding that Defendant's counsel did not have a legitimate reason for having a witness depart from a deposition at 3:00?***

SUGGESTED ANSWER: ***Yes.***

STATEMENT OF THE CASE

A. Procedural History

This is an appeal from the trial court's imposition of discovery sanctions on Defendant/Appellant McCabe, Trotter & Beverly, PC ("MTB").

This action began in August 2015 with the filing of a foreclosure Complaint in the Dorchester County Court of Common Pleas by the Southern Magnolia Homeowners' Association ("HOA") (which is not a party to this appeal) against Tammy Richardson ("Richardson" or "Plaintiff"), who was a member of the HOA. That case was styled *Southern Magnolia Homeowners' Association v. Tammy C. Richardson,* No. 2015-CP-18-1575. Richardson filed a Third-Party Complaint in the foreclosure action on October 29, 2015, naming MTB and Halcyon Real Estate Services, LLC as Third-Party Defendants. (*See* October 29, 2015 Amended Answer and Counterclaim and Third-Party Complaint). Specifically, Richardson asserted a claim for violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* ("FDCPA"), against MTB. MTB filed an Answer to the Third-Party Complaint on December 21, 2015. (*See* December 21, 2015 Answer to Third-Party Complaint of McCabe, Trotter & Beverly, P.C.). Lawyer Andrew Countryman, who is not a party to this appeal, was retained to defend MTB from Richardson's third-party claims.

On March 7, 2016, MTB filed a Motion to Strike/Dismiss/Sever the Third-Party Complaint. On June 1, 2016, Judge Edgar W. Dickson denied the motion to dismiss, but severed the claims against MTB and Halcyon. (*See* Order on McCabe, Trotter & Beverly, and P.C.'s Motion to Dismiss the Third Party-Complaint). The court then assigned a new case number to Richardson's third-party claims against MTB and Halcyon, No. 2016-CP-18-1001. This is the case number presently on appeal.

The Sanctions Order at issue imposes sanctions against MTB based on the conduct of its lawyer, Andrew Countryman, at two depositions: (a) Haylen Gatling; and (b) Sheri Self. Specifically, on April 4, 2019, the Honorable Maite Murphy entered an Order Granting Richardson's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motions

for Protection (Self and Gatling) ("Sanctions Order"). (*See generally* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling)). On April 15, 2019, Defendant MTB filed a Motion to Reconsider relating to the Sanctions Order. (*See* April 15 2019 Motion for Reconsideration). The trial judge denied that motion on April 26, 2019. (*See* April 26, 2019 Order Denying MTB's Motion for Reconsideration). For the reasons that follow, Judge Murphy erred in imposing sanctions on MTB.

B. The Depositions at Issue

1. The Deposition Notices and Communications Before the Depositions

On November 9, 2018, Justin Kahn, Ms. Richardson's lawyer, served a Notice of Videotaped Deposition of Haylen Gatling ("Gatling Notice"), a legal assistant at MTB. (*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions Ex. 3). The Gatling Notice included the following language concerning documents that Richardson might use at the deposition:

> PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 30(j)(8), SCRCP, counsel for the Plaintiff hereby identifies and reserves the right to use any documents produced or made available in discovery by any party during this deposition, and hereby gives notice of the Plaintiff's intent to question the witness regarding all documents produced, identified or made available by any party during the course of discovery, as well as those obtained pursuant to subpoena or records request.

(*See id.*, at 1-2). The Gatling Notice set the deposition for January 15, 2019, in Columbia, South Carolina.

On November 13, 2018, Mr. Kahn served a Notice of Videotaped Deposition of Sheri Self ("Self Notice"), a former MTB legal assistant. (*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions Ex. 2). The Self Notice included the same endorsement regarding South Carolina Rule of Civil Procedure 30(j)(8) ("Rule 30(j)(8)") and making a blanket reference to all material exchanged in discovery. (*See id.*, at 1-2). The Self Notice set the deposition for January 24, 2019, in Macon, Georgia.

The parties have exchanged over 100,000 documents in this class action case. However, neither the Gatling Notice nor the Self Notice identified any specific document pursuant to Rule 30(j)(8). Instead, they purported to give notice that Plaintiff intended to question the witness regarding *all* of the many thousands of documents "produced, identified, or made available by any party during the course of discovery" or obtained pursuant to subpoena or records request.

On November 14, 2018 (days after receiving the Notices and more than two months before the depositions), Andrew Countryman, counsel for MTD, wrote to Mr. Kahn that the Gatling Notice and the Self Notice did not comply with Rule 30(j)(8) and asked for a meaningful identification of documents he planned to use:

> The purpose of the Rule is to avoid surprise and wasting time during a deposition. Thousands and thousands of documents have been produced in discovery in this case. Blanketly referring to all of them does not comport with the letter or spirit of the Rule. Unless you identify or produce specific material you actually plan to use in the depositions two days beforehand, *I reserve the right to discuss material presented to the witnesses privately during the deposition(s).*

(*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions Ex. 4 (emphasis added)). Mr. Kahn did not respond to this letter over the course of nearly two months. Instead, at 6:31 p.m. on Friday, January 11, 2019 (just days before Gatling's deposition set for the upcoming Tuesday), Mr. Kahn emailed Mr. Countryman stating "these are some of the documents we may use in addition to those previously identified for the depositions next week." (*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 8). Attached to this email was a 68-page spreadsheet listing thousands more documents. (*See id.*; March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions Ex. 5). Mr. Countryman responded on January 15, 2019 that the massive 68-page spreadsheet did not satisfy Rule 30(j)(8):

> You sent a 68-page spreadsheet referencing the "beginning" bates numbers of approximately 3,000 documents. You also referred to "documents previously identified." The only document you identified before included everything exchanged in discovery. As noted in my 11/14/18 letter, this is insufficient to identify documents under Rule 30(j)(8). Referencing over 3,000 pages of material in a spreadsheet is no better.

> It would be objectively impossible for anyone to use that many documents in either of or both of these deposition[s]. I still have no idea what material you truly plan to use in the depositions. This appears to be a sad attempt to obtain soundbites from unsophisticated (non-lawyer) using documents with which they are unfamiliar. It is certainly not a good faith effort to identify documents under the Rule.

(*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions Ex. 6).

On January 21, 2019, Mr. Kahn emailed Mr. Countryman, attaching a 67-page document listing thousands of documents that he might use in Ms. Self's deposition. (*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions, at 12-13 and Ex. 7 thereto). Mr. Kahn noted that he did not believe that even this list was required to comply with his Rule 30(j)(8) obligations.

2. <u>Gatling Deposition</u>

Ms. Gatling was the first of the two witnesses deposed. Mr. Kahn examined the witness, and Mr. Countryman represented her. Directly before the deposition began, Mr. Countryman reiterated to Mr. Kahn that his blanket reference to all material exchanged in discovery and 68-page spreadsheet did not satisfy Rule 30(j)(8):

> I spoke with Mr. Kahn about these issues the morning of Ms. Gatling's deposition and said his identification of thousands of pages of material was insufficient to give me any idea as to what he actually planned to use with the witness. I also said I would be happy to review the actual exhibits with her shortly before the deposition started to avoid interrupting the deposition to review the documents with her. Mr. Kahn refused to provide documents, provide an explanation or discuss the issue further.

(*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions, at 8-9). The deposition proceeded until lunch with Mr. Kahn presenting no substantive exhibits. (*See id.*, at 9). When the deposition broke for lunch, Mr. Countryman again asked Mr. Kahn for the exhibits so he could review them with the witness during the break and avoid interrupting the deposition, but Mr. Kahn refused. (*See id.*).

Mr. Countryman then wrote Mr. Kahn another letter on the issue summarizing the events leading up to the Gatling deposition and highlighting the fact that his refusal to identify material he planned to use in the deposition was an effort to obtain an unfair advantage:

> It would be objectively impossible for anyone to use that many documents in either of or both of these deposition. I still have no idea what material you truly plan to use in the depositions. This appears to be a sad attempt to obtain soundbites from unsophisticated (non-lawyer) using documents with which they are unfamiliar. It is certainly not a good faith effort to identify documents under the Rule.

(*See* March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions Ex. 6). Mr. Kahn has never denied this and only responded that the Rules do not require him to do anything other than refer to all material produced in discovery.

When the deposition resumed after lunch, Mr. Kahn showed Ms. Gatling a document. Mr. Countryman broke the deposition in accordance with Rule 30(j)(8) to review that document with the witness. (*See* February 7, 2019 Pl.'s Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3, at 182:13-22). Mr. Countryman then described, on the record how the Gatling Notice failed to satisfy Rule 30(j)(8):

> You noticed this deposition I think in the first week of November of 2018. The week after that, I sent you a letter indicating that the notice was insufficient to identify documents under 30(j)(8) as the rule is intended to identify documents that you'll use in a deposition so that a witness won't be surprised. Instead, your notice identified basically everything that had been exchanged in discovery. I didn't get any response to that letter. I then received an email Friday at 6:30, again referencing every document in discovery, and including a 68-page spreadsheet of different -- a list of different documents.
>
> I don't think that's sufficient under the rule. I talked to you about that this morning before the deposition and invited you to provide me with documents so I could go over them with her. You didn't.
>
> You did that again before lunch, and I gave you a letter at lunch. We had about an hour lunch, and I gave you that same opportunity, which you declined.
>
> So I'm going to talk to the witness about this within a reasonable period of time as the rule provides.

(*See id.,* at 184:6-185:3). Mr. Countryman further noted that "this case involves tens of thousands, if not hundreds of thousands, of documents. I had no idea what documents would be used in this deposition. Identification beforehand didn't give me that idea. That's all I've been asking for. I'm not trying to be unreasonable. I'm not trying to be obtuse, or delay things." (*See id.*, at 186:3-9).

At that point, Mr. Kahn provided Mr. Countryman with the material he planned to use (15 exhibits), and Mr. Countryman discussed them with the witness. (*See* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3 (Gatling Deposition), at 185-86). When the deposition resumed, Mr. Kahn asked Ms. Gatling what she had talked about with Mr. Countryman; Mr. Countryman instructed Ms. Gatling not to answer on the basis of attorney-client privilege:

> Q What did you all talk about?
>
> MR. COUNTRYMAN: Don't answer that.
>
> MR. KAHN: Okay. We'll let the judge take it up. . . .
>
> MR. COUNTRYMAN: Can I make a quick statement for the record before you ask your question? He asked what you talked about. I directed you not to answer on the grounds of attorney-client privilege. We discussed the documents that you were given just a few minutes ago. Those are the ones that were not, in my view, previously properly identified under Rule 30(j)(8). That's something that he and I can discuss at another time. But I'm directing you not to answer that question under attorney-client privilege grounds.

(*See id.*, at 186:22-25, 187:8-17). Mr. Kahn did not limit the question to determine whether Mr. Countryman had done anything improper off the record to influence her testimony.[1]

Mr. Countryman did nothing to interfere with Mr. Kahn's ability to fully and completely

---

[1] In MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, Mr. Countryman described what happened in Ms. Gatling's deposition in his own words:

> Upon commencing the deposition after lunch, Mr. Kahn showed the witness the Notice of Right to Cure letter for Ms. Richardson's case. I did not object since the witness was familiar with it. See pages 170 – 181 of transcr. of Ms. Gatling's deposition, Ex. 3 to the Motion for Sanctions. Mr. Kahn then showed the witness a document with which she was not familiar. I objected and indicated my intent to discuss it with her under Rule 30(j)(8).
>
> At this point, Mr. Kahn provided me with the majority of material he planned to use with the witness. The deposition broke briefly during which time I reviewed the proposed exhibits with the witness. Stephanie Trotter, a principal of MTB who attended the deposition on behalf of MTB, attended the meeting too. Mr. Kahn then asked Ms. Gatling what we discussed in the private meeting. I objected on grounds of attorney-client privilege and instructed her not to answer.

(*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 10).

depose Ms. Gatling. The deposition began at 10:00 a.m. and lasted until 6:25 p.m. that evening. (*See id.*, at 1 & 293). Moreover, in an effort to be civil and fair to opposing counsel, Mr. Countryman allowed Mr. Kahn's co-counsel, Mary Leigh Arnold, to also examine the Ms. Gatling without objection. (*See id.*, at 236:19-23).

As required by Rule 30, on January 21, 2019, MTB filed a Motion for Protective Order (Deposition of Haylen Gatling). In that Motion, MTB asserted:

> Plaintiff's identification of material under Rule 30(j)(8) did not substantively comply with the Rule, nor was it timely under it. Because Plaintiff's counsel did not provide or identify material he planned to use with the witness two days prior to the deposition, MTB's counsel had the right under Rule 30(j)(8) to discuss the material with the witness privately. Therefore, the Court should protect the witness from having to answer the questions asking what she discussed with counsel during the meeting regarding the documents during the deposition.

(*See* January 21, 2019 Motion for Protective Order (Deposition of Haylen Gatling), at 9). Judge Murphy denied this Motion for Protective Order in her Sanctions Order discussed below.

3. <u>Self Deposition</u>

More than a week after Ms. Gatling's deposition, Mr. Kahn deposed Ms. Self. The deposition took place in Macon, Georgia, where Ms. Self lives and works as a legal assistant. Mr. Countryman represented Ms. Self and helped schedule the deposition. (*See* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2 (Self Deposition), at 23:25-24:10). Ms. Self appeared voluntarily without a subpoena, which Mr. Kahn would have had to domesticate.

Minutes into the deposition, Mr. Kahn examined Ms. Self concerning one of the thousands of documents that had been produced in discovery. Citing Rule 30(j)(8), Mr. Countryman promptly indicated he needed to privately consult with Ms. Self:

> MR. COUNTRYMAN: I'm going to have to talk to her about this. I don't think this was properly identified under 30(j)(8). . . .
>
> Q: Did you see that sentence?
>
> MR. COUNTRYMAN: And I'm going to tell her not to answer that before we discuss it.

MR. KAHN:

Q: Do you see that sentence?

MR. COUNTRYMAN: So don't answer that.

(*See id.*, at 21:4-14). After a short 2-3 minute conference between Mr. Countryman and Ms. Self, Mr. Kahn asked the witness what she had discussed with her attorney:

Q: All right. I want to -- the document that you walked out of the -- you walked out of the room with that document; right?

A: Right.

Q: And had a discussion with Mr. Countryman?

A: Yup.

MR. KAHN: I just -- I want to mark it as Plaintiff's Exhibit No. 1. Let me just --

(HOA FEE PROPOSAL MARKED PLAINTIFF'S EXHIBIT NO. 1 FOR I.D.)

BY MR. KAHN:

Q: And what -- what did you all talk about?

MR. COUNTRYMAN: Don't answer that question. That's --

A: (Continuing) It's client privileged.

MR. COUNTRYMAN: -- privileged.

THE WITNESS: Right?

MR. COUNTRYMAN: I'm telling you not to answer it because it's attorney-client privileged.

THE WITNESS: Right.

MR. COUNTRYMAN: The document was not properly identified under Rule 30(j)(8), two days or more ahead of the deposition. And, Justin, we've talked about this issue at length. I sent you multiple letters on the issue. Providing a 67-page spreadsheet identifying probably a 100,000 documents, in my view, does not sufficiently identify this document under 30(j)(8).

(*See id.*, at 22:11-23:13).

After Mr. Countryman had stated his position on the record concerning Richardson's

failure to comply with Rule 30(j)(8), Mr. Kahn could have acted to make the deposition more efficient. As Mr. Countryman noted to the court below, "[a]t any time before or during the deposition, Mr. Kahn could have provided the (sic) all the documents to review with the witness at once." (*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 17). Mr. Kahn refused. Instead, over and over again, he repeatedly showed individual documents to the witness, and Mr. Countryman would have a very short (typically 2-3 minute) conference with the witness about them:

(a) 12:35 – 12:37 to review deposition Exhibit 3 (*see* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2, at 105);

(b) 12:45 – 12:48 to review deposition Exhibit 4 (*see id.,* at 113);

(c) 12:52 – 12:54 to review deposition Exhibit 5 (*see id.,* at 118);

(d) 12:59 – 1:02 to review deposition Exhibit 6 (*see id.,* at 123);

(e) 1:23 – 1:26 to review deposition Exhibit 8 (*see id.,* at 148);

(f) 1:28 – 1:30 to review deposition Exhibit 9 (*see id.,* at 151);

(g) 1:35 – 1:37 to review deposition Exhibit 10 (*see id.,* at 155-56);

(h) 1:42 – 1:51 to review deposition Exhibit 11 (*see id.,* at 161);

(i) 2:01 – 2:04 to review deposition Exhibit 12 (*see id.,* at 172);

(j) 2:14 – 2:16 to review deposition Exhibit 13 (*see id.,* at 183);

(k) 2:18 – 2:10 to review deposition Exhibit 14 (*see id.,* at 185-86);

(l) 2:29 – 2:32 to review deposition Exhibit 15 (*see id.,* at 194);

(m) 2:43 – 2:45 to review deposition Exhibit 16 (*see id.,* at 204-05).

On every occasion above, after the brief conference between Ms. Self and Mr. Countryman (her and MTB's counsel), Mr. Kahn pointedly asked specifically what Ms. Self had discussed with Mr. Countryman. (*See id.*, at 105:6-11, 113:15-18, 118:19-21, 123:14-16, 148:14-16; 151:8-10, 156:14-17, 161:10-13, 172:20-22, 183:19-21, 186:9-11, 195:1-7, and 205:12-14). On all but one

of those occasions, Mr. Countryman instructed Ms. Self not to answer on the basis of attorney-client privilege and Rule 30(j)(8). (*See id.*).

The record plainly indicated that Mr. Countryman did not act to thwart or interfere with Mr. Kahn's taking of Ms. Self's deposition or attempt to limit his ability to engage in full and complete discovery. To the contrary, Ms. Self, MTB and Mr. Countryman had made numerous accommodations to Richardson's counsel concerning Ms. Self's deposition.

For example, they permitted Ms. Self's appearance in Georgia without a properly domesticated subpoena. Additionally, Mr. Countryman allowed the deposition to go forward, despite the fact that the court reporter — who was from South Carolina — was unable to place the witness in Georgia under oath as South Carolina Rule of Civil Procedure 30(c) requires. *See* S.C. R. Civ. P. 30(c) ("The officer before whom the deposition is to be taken shall put the witness on oath . . . ."). In particular, Mr. Countryman "kindly" allowed a Georgia notary to swear in the witness:

> An issue was -- or a question was raised by defense counsel, prior to the deposition starting, about the fact that the court reporter, who's been involved with many of the depositions in this case, is not a notary in the state of Georgia.
>
> We have -- he has kindly agreed to allow us to have a Georgia notary swear the witness in, which has just taken place, and Teri will transcribe and prepare the deposition. So any issue about that is not an issue or has been waived.

(*See* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2, at 7:13-22).

Moreover, Mr. Countryman allowed the deposition to go forward, even though Mr. Kahn had directly contacted the witness — a former MTB employee — without obtaining Mr. Countryman's permission. (*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 5 ("Unbeknownst to me, Mr. Kahn contacted Ms. Self, who is now a legal assistant at a law firm in Macon, Georgia, directly to discuss the case and her deposition. He did not ask if I represented Ms. Self or involve me in the discussions with her until after her boss agreed that she would give a deposition.")).

Mr. Kahn refused to extend any such courtesy to Mr. Countryman. After a lunch break, Mr. Countryman asked Mr. Kahn how long he expected the deposition to take. Mr. Kahn refused to provide any indication. Mr. Countryman then noted Mr. Kahn needed to finish the deposition before 3:00 p.m. because of Ms. Self's work responsibilities and Mr. Countryman's need to care for his newborn child after the five-hour drive from the deposition. (*See id.*, at 16). Mr. Kahn ignored Mr. Countryman. When the deposition resumed, counsel discussed this on the record:

> MR. COUNTRYMAN: Real quick, I just want to make a quick statement for the record. I've talked to plaintiff's counsel and the deposition is going to be ended at 3:00. The witness has things she needs to do at work, and I need to get home.
>
> We're here by agreement, and we've agreed to be here without a subpoena, and that's what's happening.
>
> MR. KAHN: I don't agree with that, and you didn't inform me to the -- of the fact that you said you needed to leave at 3:00 until just a few moments ago during the break.
>
> We'll go forward, and the judge can deal with it.

(*See* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2 (Self Deposition) , at 92:13-93:1). Mr. Kahn never requested or proposed any alternatives to allow him to depose the witness beyond 3:00. Mr. Countryman and the witness departed the deposition at approximately 3:00 p.m. (*See id.*, at 224:18-226:4). After they left, Mr. Kahn engaged in a several-minute monologue on the record, marking two exhibits. (*See id.*, at 226:5-228:10).

On January 31, 2019, MTB filed a Motion for Protective Order (Deposition of Sheri Self), stating, in part:

> Because Plaintiff's counsel did not provide or identify material he actually planned to use with the witness two days prior to the deposition, MTB's counsel had the right under Rule 30(j)(8) to discuss the material with the witness privately during the deposition. Therefore, the Court should protect the witness from having to answer the questions asking what she discussed with counsel during the meeting regarding the documents during the deposition.

(*See* January 31, 2019 Motion for Protective Order (Deposition of Sheri Self), at 8). MTB also

sought sanctions against Mr. Kahn for failure to comply with Rule 30(j)(8). (*See id.*). Judge Murphy denied this Motion for Protective Order in her Sanctions Order discussed in the following Section.

4. Richardson's Motion for Sanctions

On February 7, 2019, Richardson filed her Notice and Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel ("Motion for Sanctions"). (*See generally* February 7, 2019 Notice and Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel). In her Motion for Sanctions, Richardson sought the following relief, *inter alia*:

> 1. Ordering the continuation of the depositions of MTB employee Haylen Gatling and former employee Sheri Self and paying the associated costs and attorney's fees for having to retake and continue the same;
>
> 2. Directing witnesses to testify in full as to the matters discussed with MTB Counsel during off-record conversations;
>
> 3. Ordering the deposition of Stephanie Trotter, an attorney who engaged in the improper witness coaching with counsel for MTB during the deposition of Haylen Gatling;
>
> 4. Ordering MTB's counsel to cease and desist from similar conduct in the future; and
>
> 5. Sanctions for engaging in improper conduct repeatedly during the depositions, engaging in off-the-record witness coaching, obstructive conduct and otherwise in violation of the deposition conduct rules.

(*See id.*, at 3). The Motion for Sanctions accused Mr. Countryman of "witness coaching" and "wrongly and repeatedly stop[ing] depositions." (*See id.*, at 6). Richardson further asserted in her Motion for Sanctions that:

> Defense counsel violated the Supreme Court's deposition conduct order because when previously disclosed documents were presented to the deponent, defense counsel stopped the deposition without stating a permissible reason, engaged in prohibited off-the-record witness coaching and then did not allow permitted inquiry into the meeting.
>
> As discussed herein, *if* there is a permissible basis for meeting with a witness during a deposition, before meeting with the witness to discuss the previously produced

> document, counsel must state a need to discuss asserting a privilege. As this did not occur, defense counsel repeatedly engaged in prohibited witness coaching and violation of the Supreme Court deposition conduct pronouncement.

(*See id.*, at 7-8 (emphasis added)). The parties submitted memoranda setting forth their respective positions. Oral argument was conducted on the Motion for Sanctions, as well as MTB's Motions for Protective Orders discussed above.

On March 28, 2019, Judge Murphy's clerk issued an email indicating she planned to grant the Motion for Sanctions and asking Richardson's counsel for a proposed Order. In that email, Judge Murphy's clerk stated that "[a]fter reviewing the deposition in its entirety, Plaintiff's Motion for Sanctions is Granted for the precise reasons stated in Plaintiff's memorandum." (*See* March 28, 2019 Email from Mr. Rowh (Judge Murphy's Law Clerk) to Counsel)). Mr. Countryman responded that he acted in good faith, requested an analysis of how Rule 30(j)(8) applied, and asked for the opportunity to comment on Plaintiff's proposed Order. (*See* March 28, 2019 Email from Mr. Countryman to Mr. Rowh (Judge Murphy's Law Clerk)). Judge Murphy did not respond to Mr. Countryman.

After Mr. Kahn submitted a proposed Order to Judge Murphy, Mr. Countryman filed a letter on April 1, 2019. The letter again formally explained MTB's position, noting that Plaintiff's proposed Order included no analysis of the application of Rule 30(j)(8):

> Plaintiff's proposed Order does not reference Rule 30(j)(8) or explain its application. It only says I improperly stopped the depositions to discuss material with witnesses without any basis. This is untrue. Rule 30(j)(8) was my basis, and I referenced this on the record and in writing many times. I ask the Court to include a discussion of the Rule, including how it applies (or does not apply) to this specific situation, in any Order issued. Simply put, is it the Court's determination that referring to all material produced or identified in discovery as potential deposition fodder sufficient to comply with Rule 30(j)(8)?

(*See* April 1, 2019 Filed Letter Countryman to Judge Murphy, at 2).

Judge Murphy did not respond. Instead, she signed Mr. Kahn's proposed Order and filed it on April 4, 2019; this is the Sanctions Order now on appeal. (*See generally* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling)). In the Sanctions Order, Judge Murphy concluded that

Mr. Countryman violated the standards for deposition conduct by: (a) repeatedly stopping depositions for off-the-record discussions that constituted coaching; (b) repeatedly stopping depositions to discuss documents produced in discovery; (c) failing to state permissible reasons for interrupting the depositions; and (d) instructing witnesses not to testify about the substance of the off-the-record discussions. (*See id.*, at 5-6). Additionally, the Sanctions Order stated Mr. Countryman improperly instructed Ms. Self to leave her deposition at 3:00, before it was completed. (*See id.*, at 6). The Sanctions Order does not discuss or analyze the applicability of Rule 30(j)(8); instead, Judge Murphy sanctioned MTB, without analyzing the key issues Mr. Countryman raised.

Judge Murphy imposed the following sanctions on MTB:

- That the depositions of Ms. Gatling and Ms. Self be reconvened and completed without impediment, at MTB's expense;
- That Stephanie Trotter be deposed without impediment, at MTB's expense;
- That MTB's counsel cease and desist from prohibited behavior set forth therein; and
- That MTB pay attorneys' fees and costs for the depositions taken and to be taken.

(*See id.*, at 7-9).

MTB filed a Motion to Reconsider and supporting Brief on April 15, 2019. (*See* April 15, 2019 Motion to Reconsider Order Entered April 4, 2019 and to Stay Relief Requested Granted in Order (Expedited Hearing Requested)). Judge Murphy denied the Motion to Reconsider in an Order that contained no substantive explanation and failed to address any of the issues raised in counsel's correspondence or the Motion:

> This matter came before the Court on April 15, 2019 on Defendant McCabe, Trotter & Beverly, P.C.'s ("MTB") Motion for Reconsideration of this Court's April 4, 2019 Order. Since all arguments raised in the motion were previously raised and sufficiently ruled upon in the April 4, 2019 Order, the stay as well as the relief sought therein is denied in its entirety without the need for an additional hearing.
>
> NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for

Reconsideration is DENIED IN ITS ENTIRETY.

(*See* April 26, 2019 Order Denying McCabe, Trotter & Beverly, P.C.'s Motion for Reconsideration).

MTB, through its counsel, has sent Mr. Kahn checks in fulfillment of the monetary portions of the Sanctions Order under protest and subject to its right to appeal the Sanctions Order. MTB also made the witnesses available, and those depositions have been concluded without interruption or further complaint by Mr. Kahn. This includes the deposition of Ms. Self, an out-of-state fact witness over whom MTB had no control, Ms. Gatling and Stephanie Trotter (who attended the off-the-record conversation between Mr. Countryman and Ms. Gatling). None of these witnesses testified that Mr. Countryman attempted to coach their testimony or engaged in any nefarious conduct. In light of the trial court's ruling, counsel for MTB did not object on Rule 30(j)(8) grounds in the reconvened depositions.

On or about April 22, 2019, MTB filed the instant Notice of Appeal. This appeal relates to Judge Murphy's finding that MTB engaged in sanctionable conduct and her imposition of monetary sanctions on MTB. For the reasons discussed below, this Court should reverse Judge Murphy's imposition of sanctions on Defendant MTB.

ARGUMENT

I. STANDARD OF REVIEW

Under South Carolina law, an appeal from the imposition of discovery sanctions under Rule 37 is often determined under an abuse of discretion standard:

> "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon,* 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). Therefore, an appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. *Karppi v. Greenville Terrazzo Co., Inc.,* 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted).

See Davis v. Parkview Apartments, 409 S.C. 266, 281–82, 762 S.E.2d 535, 543 (2014).

However, Appellant MTB contends that — at least with regard to the award of attorneys' fees as a sanction, the appropriate standard of review is the same as the standard of review over an equitable determination. "An action for attorneys' fees is one in equity." *See In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). In appeals in the similar context of Rule 11 sanctions and sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act, this Court has applied an equitable standard of review to factual findings:

> The determination of whether attorney's fees should be awarded under Rule 11 or under the Act is treated as one in equity. *In re Beard,* 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory,* 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. *Id.* Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.*

See Southeastern Site Prep, LLC v. Atlantic Coast Bldrs. and Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653-54 (Ct. App. 2011). Thus, while the trial court has broad discretion in awarding sanctions, this Court can and should review *de novo* the factual findings upon which it based that imposition of sanctions.

II. THE SANCTIONS ORDER IS APPEALABLE TO THIS COURT

After requesting and obtaining briefing on the question of appealability in this matter, this Court entered an Order on June 28, 2019, stating:

> After careful consideration of the parties' memoranda addressing appealability, the court has determined this appeal shall proceed at this time. Nothing in this order prevents the parties from addressing the issue of appealability in their briefs.

In anticipation of Richardson arguing that the Sanctions Order is not immediately appealable, MTB will set forth why the Court has proper jurisdiction over this appeal from an appealable order.

"Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision." Rule 201, SCACR. The Court of Appeals shall have appellate jurisdiction for the correction of errors of law where:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code § 14-3-330.

"As a general rule, only final judgments are appealable." *Ex parte Wilson v. Pender*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (*citing Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163 (1996)). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Id.* at 12-13, 625 S.E.2d at 208 (*citing Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993); *Good v. Hartford Accident Indemn. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) ("[A] final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term . . . .")). "If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Mid-State Distributors*, 310 S.C. at 335, 426 S.E.2d at 780 (citing Good, 201 S.C. at 32, 21 S.E.2d at 212). "'The object of th[e] requirement (that an order or judgment must be final before an appeal will lie) is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals.'" *Good*, at 32, 21 S.E.2d at 212 (citation omitted).

An order denying or compelling pretrial discovery is generally not directly appealable "because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined." *Wilson*, 367 S.C. at 13, 625 S.E.2d at 208 (*citing Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974)). However, "a writ of error will lie . . . to a final judgment or an award in the nature of a final judgment[.]" *Good*, at 32, 21 S.E.2d at 212. A contempt order, for example, is "a final order that is immediately appealable." *Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999). This is because "[a] civil compensatory fine is analogous to a tort judgment for damages caused by wrongful conduct." *Jarrell v. Petoseed Co.*, 331 S.C. 207, 210, 500 S.E.2d 793, 794 (Ct. App. 1998). Accordingly, contempt orders stand apart from the underlying action. *Id.* ("Civil compensatory contempt's purpose . . . is not coercive, but rather is designed to remedy past noncompliance. Termination of the prior action between the parties, therefore, does not render [an] appeal moot."). As a result,

contempt orders involve the merits and determine a substantial matter forming an underlying cause of action. *Id.* at 213 n.1, 500 S.E.2d at 796 n.1.

In *Hooper*, the Supreme Court held that any order issued as a result of a merit hearing or contempt proceeding constitutes an immediately appealable final order. *Id.* at 291-92, 513 S.E.2d at 364. In *Hooper*, a parent challenged the family court's issuance of a consent emergency removal order, an *ex parte* emergency removal order, and an emergency removal order issued as the result of a probable cause hearing, as well as an emergency removal order issued as the result of a merits hearing and a contempt order issued by the family court. *Id.* at 286-88, 513 S.E.2d at 361-62. The Court held that the consent order, *ex parte* order, and order issued as the result of a probable cause hearing constituted interlocutory orders that were not immediately appealable. *Id.* at 290-91, 513 S.E.2d at 363. The Court conversely held that the order issued as the result of a merits hearing and the contempt order were immediately appealable final orders. *Id.* at 291-92, 513 S.E.2d at 364. The Court reasoned that such orders constituted final orders because they were issued after a hearing at which the parties presented their case and evidence (and had an opportunity to challenge evidence), and the trial court made determinations of law and fact in accordance with the burden of proof. *Id.*

Although no reported South Carolina case addresses whether a non-contempt monetary sanction constitutes an immediately appealable final order, the majority rule among federal circuit courts of appeal is that a district court decision imposing monetary sanctions is final once the court decides the amount of sanction.[2] *See e.g., Orenshteyn v. Citrix Systems, Inc.*, 691 F.3d 1356, 1357-58 (Fed. Cir. 2012); *View Engineering, Inc. v. Robotic Vision Systems, Inc.*, 115 F. 3d 962 (Fed. Cir. 1997). The federal courts reason that, unlike other judicial relief, attorneys' fees are not compensation for underlying injury giving rise to the suit and, therefore, are separable from plaintiff's primary cause of action. *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 452 (1982).

[2] The South Carolina Supreme Court has previously looked to federal courts for guidance when determining whether orders not previously considered constitute immediately appealable final orders. *See Ex parte Wilson v. Pender*, 367 S.C. 7, 13 & 16 n.1, 625 S.E.2d 205, 208 & 210 n.1 (2005).

As a result, monetary sanctions are "treated as separate final decisions, which must be covered by separate notices of appeal—each filed after the subject has independently become 'final.'" *McCarter v. Ret. Plan for the Dist. Managers of the Am. Family Ins. Grp.*, 540 F.3d 649, 652 (7th Cir. 2008).

Like contempt orders, the monetary sanctions in the Sanctions Order are designed to remedy past noncompliance and stand apart from the underlying action. (*See* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling), at 7. ("[P]rejudice has been shown in the form of expenditure of costs and wasted time of deposing counsel and the witness. There is a clear need to deter this conduct in the future and to protect against discovery abuse.")). Moreover, the trial judge entered the Sanctions Order after a hearing at which the parties presented their arguments and evidence (and had an opportunity to challenge same), and the trial court made determinations of law and fact in accordance with the burden of proof. (*See id.*, at 7 ("It has been shown that [Appellant]'s counsel acted willfully and in bad faith.")). In addition, the trial judge determined the amount of the sanction. (*See id.*, at 7-9).[3] As a result, the monetary sanctions constitute a final, separate decision that is immediately appealable.

In the alternative, even if the Court determines that the Sanction Order is not immediately appealable, this Court may exercise jurisdiction to address a novel issue in the interest of judicial

---

[3] Additionally, the portions of the Sanctions Order in the form of an injunction requiring MTB and its counsel to cease and desist certain deposition conduct are immediately appealable. An interlocutory order or decree granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code § 14-3-330. Even those orders that are "in the nature of an injunction" are immediately appealable. *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). The injunction portions of the Sanctions Order are also appealable because it "in effect determines the action and prevents judgment from which an appeal might be taken[.]" *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (citation omitted).

"[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565 564 S.E.2d 94, 98 (2002). Accordingly, this Court should address all issues arising from the Sanctions Order for judicial economy and full adjudication of these matters because there is at least a portion of the Order that is immediately appealable.

economy. *See Ex parte Wilson v. Pender*, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005). South Carolina appellate courts also have an interest in cases involving novel issues of significant public interest or legal principles of major importance. *See* Rule 204(b), SCACR. This includes the consideration of matters for the benefit of the South Carolina Bar. *See In re Anonymous Member of South Carolina Bar,* 346 S.C. 177, 182, 552 S.E.2d 10, 12 (2001) (discussing attorney conduct in depositions for benefit of Bar).

"Since depositions almost always occur without direct judicial supervision, lawyers must regulate themselves during this highly critical stage of litigation." *Id.* at 188, 552 S.E.2d at 15. Accordingly, this is an area of interest for the South Carolina Bar. *See e.g.*, Warren Moise, *Turnips and Trial Ethics*, 20-JUL S.C. Law. 10 (July 2008) ("The rules don't specifically say whether providing and identifying documents in response to interrogatories and requests to produce satisfy this requirement."). While the Supreme Court has construed a portion of Rule 30(j)(8), no reported South Carolina opinion addresses whether merely identifying all documents produced in discovery or obtained by subpoena or records request satisfies Rule 30(j)(8).

For all of these reasons, the Court should exercise jurisdiction over this appeal.

III. THE TRIAL JUDGE SHOULD NOT HAVE IMPOSED SANCTIONS ON MTB

A. The Record Does Not Support the Conclusion That MTB's Counsel Violated Rule 30(j)(8).

Judge Murphy imposed sanctions on MTB because of claimed violations of South Carolina Rule of Civil Procedure 30, which provides in relevant part:

> Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document.

See S.C.R. Civ. P. 30(j)(8). Specifically, Judge Murphy concluded that MTB (through Mr. Countryman) violated this rule by: (a) conducting off-the-record conferences with the witnesses to discuss documents and, in effect, witness coaching; (b) failing to state a reason for the stoppages, such as whether a privilege would be asserted for a particular document as a result of the conference; and (c) instructing the witnesses not to answer what was discussed in these conferences.

In *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001), the South Carolina Supreme Court discussed Rule 30(j), including subsection (8). With regard to off-the-record conferences, the Court stated:

> Once a deposition begins, an attorney and a client may have an off-the-record conference only when deciding whether to assert a privilege or to discuss a previously undisclosed document. *See* Rule 30(j)(5), SCRCP; Rule 30(j)(8), SCRCP. Before beginning such a conference, the deponent's attorney should note for the record that a break is needed to discuss the possible assertion of a privilege or a newly produced document. After any such conference, the conferencing attorney should state on the record why the conference occurred and the decision reached. If the party decides to assert a privilege, the basis for the privilege should be clearly stated. Whether or not a privilege is asserted, deposing counsel may inquire on the record into the subject of the conference to determine if there has been any witness coaching. *See* Rule 30(j)(6), SCRCP. Conferences called to assist a client in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions.

See id., 346 S.C. at 190-91, 552 S.E.2d at 16-17. The Court further stated that violations of Rule 30(j) could lead to the imposition of sanctions:

> "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). The entire thrust of our 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). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958).
>
> Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery. [Citation omitted.] Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable

> behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. . . . Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions.

See id., 346 S.C. at 193-94, 552 S.E.2d at 18.

For the reasons that follow, Judge Murphy erred in imposing sanctions on MTB for the conduct of its attorneys under Rule 30(j)(8).

1. Richardson Failed to Identify the Documents as Required by Rule 30(j)(8) and, as a Result, Mr. Countryman Was Permitted to Privately Confer with the Witnesses During Their Depositions.

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous*, 346 S.C. at 193, 552 S.E.2d at 18 (*quoting In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999)). The entire thrust of our 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). The discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *In re Anonymous*, 346 S.C. at 193, 552 S.E.2d at 18; *accord United States. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). The core purpose of discovery is to obtain the *truth*. *See,* e.g., *Samples, supra.*

Rule 30 discusses the conduct of lawyers during depositions. Our Supreme Court has provided some guidance on how Rule 30 applies. "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *In re Anonymous*, 346 S.C. at 188, 552 S.E.2d at15. In depositions, lawyers may face the greatest conflict between their obligations to the court and opposing counsel under South Carolina Rule of Professional Conduct Rule 3.4, and their obligations to their own client under Rule 1.3.

Because depositions usually occur without direct judicial supervision, lawyers must regulate themselves during this highly critical stage of litigation. The Supreme Court has sanctioned lawyers who have failed to properly conduct themselves during depositions. *In re*

Anonymous, 346 S.C. at 188, 552 S.E.2d at 15 (*citing Matter of Golden*, 329 S.C. 335, 496 S.E.2d 619 (1998)). In addition to subjecting themselves to possible ethical sanctions, the trial court may sanction attorneys who engage in deposition misconduct. *See* Rule 37, S.C.R.C.P.

As discussed above, Rule 30(j)(8) provides that: "[d]eposing counsel shall provide to opposing counsel" or identify any documents to be shown to the witness during the deposition. If counsel fails to do so at least two business days before the deposition, then the witness and her counsel may discuss the documents privately before the witness answers questions about them. *See id.* Richardson says Mr. Countryman violated Rule 30(j)(8) because such "documents [we]re provided (or otherwise identified) at least two business days before the deposition[s]." Richardson relies on: (a) the Gatling Notice and the Self Notice, which literally identify every document produced in discovery; and (b) 67- and 68-page spreadsheets identifying thousands of pages of documents as potential exhibits.

Richardson's argument fails because Mr. Kahn did not properly identify the documents that he intended to use in the depositions of Ms. Gatling and Ms. Self. To the contrary, he refused to identify the documents he planned to use in an effort to gain a tactical advantage in the depositions. Therefore, Rule 30(j)(8) authorized Mr. Countryman to *privately* confer with these witnesses about those documents.

The South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." *See* S.C.R. Civ. P. 1. "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Ex parte Wilson,* 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005). "'[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.'" *James v. South Carolina Dep't of Transp.*, 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (*quoting Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004)). "In interpreting a statute and a rule of civil procedure we follow the cardinal rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute or rule." *Marichris,*

LLC v. Derrick, 384 S.C. 345, 352, 682 S.E.2d 301, 305 (Ct. App. 2009). The notes to the 2000 amendment to Rule 30 notes that the addition of subsection (j) was intended "to help eliminate conduct tending to interfere with or impede depositions." *See* S.C.R. Civ. P. 30, Notes to 2000 Amendment.

"In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cty. Bar Ass'n v. South Carolina Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (*citing Auto Owners Ins. Co. v. Rollison,* 378 S.C. 600, 663 S.E.2d 484 (2008)); *accord New York Times Co. v. Spartanburg Cty. Sch. Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007) ("We will reject a statutory interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

> All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, *and that language must be construed in the light of the intended purpose of the statute.* However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Ray Bell Const. Co. v. School Dist. of Greenville Cty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (emphasis in original) (*quoting Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

"The well-settled rule in South Carolina is that, where possible, all provisions of a statute must be given full force and effect." *See Nucor Steel v. South Carolina Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). The South Carolina Supreme Court has stated that "'we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law.'" *Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency*, 404 S.C. 241, 246, 743 S.E.2d 864, 866

(Ct. App. 2013) (*quoting CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

Bearing in mind these rules of construction, Mr. Kahn did not honor the letter or spirit of Rule 30(j)(8) when he refused to properly identify documents for use in the depositions of Ms. Self and Ms. Gatling. Instead, Mr. Kahn attempted to use the Rules to gain a tactical advantage in the depositions by refusing to identify a single specific document he planned to use in the depositions so that Mr. Countryman could properly prepare the witnesses with those documents, rather than having them sprung on the witnesses after being sworn in.

Richardson's construction of 30(j)(8) essentially renders it a nullity and produces an absurd result. She contends that the reference to the many thousands of documents produced in discovery satisfies the purpose of this Rule, which was intended to ensure fairness in depositions. Mr. Kahn says the fact that a party produced a document in discovery obviates the requirements of Rule 30(j)(8). This argument would mean that Ms. Gatling and Ms. Self, fact witnesses who are not parties to this case, should be sufficiently familiar with over 100,000 pages of material produced in discovery to offer cogent testimony about any or all of them. This interpretation leads to an absurd result and renders Rule 30(j)(8) meaningless, in that a witness in any document-intensive lawsuit could be deprived of any notice of what documents might be used in his or her deposition. The production of a document in discovery has nothing to do with compliance with Rule 30(j)(8); rather, the Rule is concerned with notifying the parties of *which* documents produced in discovery (or not yet produced) might be used.

This is particularly true in cases like this where the parties exchanged many thousands of documents during discovery. Mr. Kahn did not issue the deposition Notices in accordance with the rules, in that they stated that Plaintiff could question the witnesses about "*all documents* produced, identified or made available by any party during the course of discovery, as well as those obtained pursuant to subpoena or records request." (March 1, 2019 MTB's Brief in Opposition to Richardson's Motion for Sanctions Ex. 2 and Ex. 3) (emphasis added).

Mr. Kahn obviously did not intend to question the witnesses about every single document produced in discovery or obtained through a subpoena or records request. Instead, he intended to use the Rule to disguise the documents he planned to use in the depositions. To that end, the Notices provided Mr. Countryman with no information about what documents Plaintiff intended to use. They kept Mr. Countryman in the dark and completely avoided identifying any document counsel actually planned to use.

Richardson's construction of Rule 30(j)(8) places an impossible burden on a party preparing a witness, as the use of boilerplate language would require the attorney to literally review with the witness every single document produced in discovery. This allows a deposing attorney to ambush a witness with a document that defending counsel did not select out of thousands of pages of documents to discuss with the witness. Rule 30(j)(8) was created as part of an effort to increase fairness, civility, and efficiency in depositions. As written, the Rule now makes clear that attorneys are not required to read the mind of opposing counsel about documents that he might use in deposition.

Without citing any authority, Richardson argues that Rule 30(j)(8) somehow does not apply to material produced by a party in discovery. In other words, Mr. Kahn claims that he does not have to identify exhibits under Rule 30(j)(8) if that material comes from MTB's production in discovery. The fact that a party has produced a document in discovery has nothing to do with whether a witness is familiar with the document or that counsel would select that document to review with the client in preparation for the deposition. The point of the Rule is for a witness to testify as knowledgably as possible – in an effort to get to the truth. The Rule guarantees that an attorney will have a fair chance to efficiently and effectively prepare the witness for deposition. MTB does not seek an unfair advantage; it only seeks to level the playing field. MTB produced over 100,000 documents in this case. Mr. Kahn used between 15-20 of these as exhibits in the subject depositions and refused to specifically identify any of the exhibits before the depositions. If Mr. Kahn's conduct is allowed, the effect of the Rule will be completely obviated.

Unfortunately, no South Carolina appellate court has analyzed whether Rule 30(b)(8) prohibits Mr. Kahn's conduct (*i.e.*, identifying a massive volume of documents without intending to use most of them).[4] However, the United States District Court for the District of South Carolina has considered this question under a Local Rule that is substantially the same as Rule 30(j)(8).[5] Applying Local Rule 30.04(H), Judge Anderson held that, even though a party may "technically" comply with that rule by identifying over 3,000 documents (most of the documents produced in the case), this still violated the "spirit" of the rule. Judge Anderson concluded that the lawyer defending the witness could confer with the witness concerning documents used in the deposition:

> Plaintiff has identified roughly 3,220 documents to be shown to King during her deposition. These documents constitute the bulk of the documents produced during discovery in this case. King's counsel has taken the position that this identification is insufficient and that if necessary, he intends to privately discuss any previously unidentified documents with King, during the deposition, for a reasonable amount of time.
>
> While it appears that the plaintiff is in technical compliance with the local rule by identifying the over 3,000 documents prior to King's deposition, the court finds such a voluminous identification does not fulfill the spirit of the local rule. The discovery rules contemplate a deponent having a reasonable opportunity to review relevant documents that will be shown to him, with counsel, prior to a deposition; and under the circumstances of this case, preparing within the limits of Fed. R. Civ. P. 30 to be questioned on over 3,000 documents is unworkable. It is not possible, in the court's view, for King's counsel to review 3,000 documents with her in the week's time which elapsed between plaintiff's identification of documents and

---

4 Perhaps this is because South Carolina lawyers generally recognize that the Rule means that a lawyer representing a witness has the right to review material used during the deposition beforehand with the witness. It is not a tool to be used to create the element of surprise.

5 Specifically, District of South Carolina Local Rule 30.04(H) provides:

> Deposing counsel shall provide to opposing counsel a copy of all documents to be shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least seven (7) days before the deposition, then the witness and the witness's counsel do not have the right to discuss the documents privately during the deposition. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.

> King's deposition. Time would not allow even a cursory review of each document to determine the application of a privilege or any other of the grounds which justify a witness's failure to answer a deposition question.

See Hoskins v. Snipes-King, No. 3:08-cv-02442-JFA, at 2 (D.S.C. July 6, 2009). He further concluded that, "in light of the voluminous number of documents identified for the deposition, it is reasonable for King and her counsel to be afforded a reasonable amount of time to review any document as necessary" during the deposition. *See id.*, at 2-3.

In a subsequent order, Judge Anderson granted a protective order prohibiting the plaintiff from deposing the witness about off-the-record conferences to discuss those documents:

> The court previously dealt with the issue of intra-deposition document review in this case. That order came about due to the voluminous number of documents plaintiff sought, perhaps understandably, to review with King during her deposition. Plaintiff was entitled to conduct a thorough deposition in accordance with the rules governing discovery, and the court's last order on this topic was an attempt to set a tone of modest accommodation that might carry over into the deposition. This attempt appears to have sadly failed. *The court will not allow plaintiff to inquire into the subject of the off-the-record conferences between King and her attorney.*

See Hoskins v. Snipes-King, No. 3:08-cv-02442-JFA, 2009 WL 10677294, at *3 (D.S.C. Aug. 6, 2009). Judge Anderson's reasoning in *Hoskins* is sound and reasonably balances the interest of the deposing party in conducting a thorough investigation and the interest of the defending party in ensuring that the party is adequately prepared to give complete and truthful testimony.

Similarly Mr. Countryman was justified in briefly reviewing the documents and discussing them with the witnesses. Plaintiff's counsel identified hundreds of thousands of documents for potential use in the depositions, but refused to identify a single document he actually planned to use before the deposition, despite Mr. Countryman repeatedly asking him to do so. The record reflects Mr. Countryman briefly reviewed the material with the witnesses during the deposition, citing Rule 30(j)(8). Mr. Countryman had every right under the Rule to review the material with the witnesses to make sure they were adequately prepared to give complete and truthful testimony – in essence the entire point of discovery and direct reason the Rule exists.

There is no evidence that Mr. Countryman did anything to coach these witnesses or manipulate their testimony. Richardson's counsel never even asked the witnesses if they had been coached. Instead, he asked the obviously improper general question: "What did you talk about with Mr. Countryman?" Had Richardson's counsel asked the correct question, he would have learned that, in fact, Mr. Countryman did not coach Ms. Gatling or Ms. Self.

Therefore, because the trial court's underpinning for sanctions — *i.e.,* that Richardson's counsel properly identified documents prior to the deposition — is flawed, the Court should reverse the trial judge's imposition of sanctions.

2. Because Richardson's Counsel Did Not Comply with Rule 30(j)(8), Mr. Countryman Properly Objected to Questioning About His Brief Discussions With the Witnesses About Certain Documents.

In the Order granting sanctions, Judge Murphy concluded that Mr. Countryman violated Rule 30 by "[i]nstructing the witnesses not to testify as to what was discussed during the prohibited off the record meetings." (*See* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling), at 6). This is incorrect. Richardson's counsel refused to properly identify documents he planned to use in the deposition. Rule 30(j)(8) therefore authorized Mr. Countryman to discuss documents with the witness privately during the deposition.

Rule 30(j)(8) allows an attorney "to privately discuss" with his client any documents first identified or produced at the deposition. It is noteworthy that, in a prior version of the rule (including the version in effect at the time of *In re Anonymous Member of S.C. Bar*), the "privately discuss" language was absent. In fact, that "privately discuss" language became effectively just weeks after the Supreme Court's decision in *In re Anonymous Member of S.C. Bar*, upon which Judge Murphy and Richardson have relied.

As explained in the Drafter's notes to Rule 30, the 2001 amendment was intended (emphasis added): "to clarify that any consultation between the lawyer and the client permitted by Rule 30 will be *private*." Because Rule 30(j)(8) was specifically amended to make all conferences

with clients about late-identified documents *private*, it would defy logic to suggest that a deposing attorney could ask a witness about the substance of such *private* conference. It would also be nonsensical to sanction the defending attorney for protecting the privacy of that discussion. This is consistent with Judge Anderson's ruling in *Hoskins, supra. See Hoskins v. Snipes-King*, No. 3:08-cv-02442-JFA, 2009 WL 10677294, at *3 (D.S.C. Aug. 6, 2019) ("The court will not allow plaintiff to inquire into the subject of the off-the-record conferences between King and her attorney."). If Richardson did not want MTB's attorney to privately consult with Ms. Self and Ms. Gatling during the deposition, her attorney should have simply properly identified which specific documents she intended to use at those depositions.

Richardson's identification of over one hundred thousand of documents for potential use in these depositions violated the language and spirit of Rule 30(j)(8). It gave Mr. Countryman no notice of the documents Mr. Kahn planned to show the witnesses — in effect hiding the material, from Mr. Countryman and preventing him from being able to review it with the witnesses before the depositions. Mr. Countryman made this abundantly clear multiple times before, during and after the depositions. Because Mr. Kahn failed to produce or identify document he planned to use deposition(s) two days in advance, Mr. Countryman could privately discuss the material with the witnesses under Rule 30(j)(8).

Since he represented the witnesses, the private discussions were privileged. Under South Carolina law, the requirements for the existence of attorney-client privilege are as follows:

> "The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens,* 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor...." *Id.* In *State v. Doster*, this Court explained the attorney-client privilege as follows:
>
> > (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981) (citation omitted).

See Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 529–30 (2010).

Mr. Countryman always made clear to Mr. Kahn that he represented not only MTB, but also Ms. Self and Ms. Gatling. For example, Mr. Countryman stated during Ms. Self's deposition, "I am your lawyer." (*See* February 7, 2019 Plaintiffs' Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2 (Self Deposition), at 23:25-24:10). Ms. Self later testified specifically that Mr. Countryman represented her and that she believed that their meetings were privileged:

> [MR. COUNTRYMAN:] Sheri, I'm your lawyer, correct, for this deposition?
>
> THE WITNESS: Yes.
>
> MR. KAHN: No. That's objection. She -- the witness has asked and answered -- has answered that as "No."
>
> MR. COUNTRYMAN: When we talked yesterday and talked before, it was with the understanding that what we said was privileged and confidential; correct?
>
> THE WITNESS: Yes.
>
> MR. KAHN: Objection.

(*See id.*, at 223:13-23). Moreover, during Ms. Gatling's deposition, Mr. Kahn (representing Richardson) referred to Mr. Countryman on multiple occasions as "[y]our attorney." (*See* February 7, 2019 Plaintiffs' Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3 (Gatling Deposition), at 16:11, 232:12 & 232:17).

Additionally, privilege attached because Mr. Countryman was representing MTB at the deposition, and the witnesses were former MTB employees there to testify about their work for MTB. *See In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997) ("[W]e hold that the analysis applied by the [United States] Supreme Court . . . to determine which employees fall within the scope of the privilege applies equally to former employees."); *In re Worldwide Wholesale Lumber, Inc.*, 392 B.R. 197, 203 (Bankr. D.S.C. 2008) ("Therefore, to the extent that counsel's communications with

Stadelman [former employee of client] concern matters within the scope of his corporate duties, these communications would be covered by the attorney-client privilege."). Therefore, irrespective of whether Mr. Countryman represented the witnesses, his representation of their former employer bestowed a privilege on their communications regarding the subject of that representation.

Mr. Countryman properly conducted private discussions with Ms. Self and Ms. Gatling to discuss documents that had not been properly disclosed prior to their depositions. He was in compliance with the Rule when he instructed the witnesses not to answer general questions as to what was discussed in those conference. The trial judge erred in imposing sanctions on MTB in connection with the depositions of Ms. Self and Ms. Gatling.

3. Mr. Countryman Did Not Violate Rule 30(j)(8) by Failing to State a Permissible Reason for Interrupting the Depositions.

In her Order imposing sanctions, Judge Murphy additionally stated that MTB's counsel violated Rule 30(j)(8) by "[f]ailing to state a permissible reason for interrupting the depositions such as whether a privilege would be asserted for a particular document and the results of such discussion." (*See* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling), at 6). Judge Murphy based her conclusion on the following statements by the Supreme Court (which Richardson quoted in her Motion for Sanctions):

> Rule 30(j), SCRCP, makes clear that a deposition's beginning signals the end of a witness's preparation. Once a deposition begins, an attorney and a client may have an off-the-record conference only when deciding whether to assert a privilege or to discuss a previously undisclosed document. *See* Rule 30(j)(5), SCRCP; Rule 30(j)(8), SCRCP. *Before beginning such a conference, the deponent's attorney should note for the record that a break is needed to discuss the possible assertion of a privilege or a newly produced document. After any such conference, the conferencing attorney should state on the record why the conference occurred and the decision reached.* If the party decides to assert a privilege, the basis for the privilege should be clearly stated. Whether or not a privilege is asserted, deposing counsel may inquire on the record into the subject of the conference to determine if there has been any witness coaching. *See* Rule 30(j)(6), SCRCP. Conferences

> called to assist a client in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions.

See In re Anonymous Member of S.C. Bar, 346 S.C. 177, 190-91, 552 S.E.2d 10, 16-17 (2001) (emphasis added). This Court should reverse Judge Murphy's imposition of sanctions because there was no separate violation of the Rules in this regard.

Under the South Carolina Rules of Civil Procedure — in addition to discussing documents not previously identified or disclosed in accordance with Rule 30(j)(8) — off-the-record conferences with witnesses may only occur consistent with the following requirements:

> (5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.
>
> (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.
>
> (7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.

See S.C.R. Civ. P. 30(j)(5)-(7).

Richardson's argument is essentially that Mr. Countryman was obligated to reveal "the purpose and outcome of" any conferences with the witnesses. However, his discussions with Ms. Self and Ms. Gatling were not under subsection (5) of Rule 30(j). Instead, as discussed above, Mr. Countryman's conferences were proper under Rule 30(j)(8). Under subsection (8), those conferences are to be "private."

Moreover, Mr. Countryman plainly told Mr. Kahn in writing and verbally multiple times he reserved the right to discuss unidentified documents with the witnesses during the depositions under Rule 30(j)(8). He clearly indicated he planned to do so to allow the witness to testify knowledgably about the documents. If Mr. Kahn was actually pursuing the truth, he would have welcomed this measure. Mr. Countryman could not have been more upfront about this position.

Therefore, neither the witness nor Mr. Countryman was required to disclose the "purpose and outcome" of the discussions. Mr. Countryman was plainly permitted to engage in those *private* discussions with Ms. Self and Ms. Gatling limited in subject matter to documents shown to the witnesses in their deposition that were not appropriately identified under Rule 30(j)(8). Richardson's requirement that Mr. Countryman disclose details about his meetings with the witnesses violates the plain language of subsection (8).

In any event, Mr. Countryman's statements on the record in the depositions made clear that he was meeting with the witnesses as Rule 30(j)(8) permits. For example, during Ms. Self's deposition Mr. Countryman stated: "I'm going to have to talk to her about this [document]. I don't think this was properly identified *under 30(j)(8).*" (*See* February 7, 2019 Plaintiffs' Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2 (Self Deposition), at 21:4-6 (emphasis added)). In another instance during Ms. Self's deposition, Mr. Countryman stated: "Sheri, I'm going to talk to you about this document before he asks you questions about it. *It was not identified under Rule 30(j)(8) before the deposition.*" (*See id.*, at 155:18-21 (emphasis added)). Following this discussion off the record, Mr. Countryman stated on the record that he had spoken to Ms. Self to take "a brief amount of time *to go over the document* with the witness before she discusses questions about it with you." (*See id.*, at 157:5-8 (emphasis added)).

Mr. Countryman also discussed this issue before the depositions in letters and conversation with Mr. Kahn. There was no confusion on the basis for Mr. Countryman's objections to Mr. Kahn's actions and for Attorney Countryman's private discussions with the witnesses about the documents. In all instances, Mr. Countryman made it abundantly clear to Richardson's counsel that he was privately discussing newly-identified documents with the witness pursuant to Rule 30(j)(8). Similarly, before discussing a document with Ms. Gatling, Mr. Countryman stated on the record that "I want to talk to her about this *under 30(j)(8).*" (*See* February 7, 2019 Plaintiffs' Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3 (Gatling Deposition), at 182:21-22 (emphasis added)).

Richardson's complaints — which are based on the claimed possibility of witness coaching — ring hollow because her counsel failed to ask proper questions to determine whether coaching had occurred. Her counsel simply asked what the witnesses had discussed with Mr. Countryman. Plainly, that question seeks to invade the "private" discussions between the witnesses and their attorney. Mr. Kahn, notably, did *not* ask Ms. Self and Ms. Gatling more directed (and less objectionable) questions, such as whether they had been coached concerning their testimony during any meetings. He did not make any effort to determine, in a proper way, whether Mr. Countryman had exerted any inappropriate influence on the witnesses' testimony.

For the foregoing reasons, the Court should reverse Judge Murphy's imposition of sanctions on MTB.

4. MTB Should Not Be Sanctioned Even if The Court Determines That Mr. Countryman Misinterpreted Rule 38(j).

South Carolina Rule of Civil Procedure 30(j)(9) provides that "[v]iolation of this rule may subject the violator to sanctions under Rule 37, SCRCP." Nevertheless, the trial court abused its discretion in imposing sanctions here. There is no controlling authority on whether identifying a massive number of documents, without any real intention of using the vast majority of them, fulfills the deposing party's obligations under Rule 30(j)(8). This is an unsettled area of the law at this time.

As demonstrated above, Mr. Countryman's interpretation of the Rule was – if not correct – imminently reasonable and completely in good faith. He was faced with a Hobson's Choice: he could either protect his client by invoking the Rule (and face possible sanctions) or forfeit his client's rights because there was no authoritative guidance on the meaning of Rule 30(j)(8). An attorney should not be forced to correctly make such a choice in order to avoid sanctions. Sanctions should not be awarded here, even if Mr. Countryman guessed wrong about Rule

30(j)(8)'s meaning, because he clearly acted in good faith and in a manner he reasonably believed was necessary to protect his client's rights.[6]

B. Mr. Countryman Did Not Act Improperly in Terminating the Deposition of Ms. Self at 3:00 p.m.

In addition to conduct during the deposition, Judge Murphy also concluded that "[a]nother example of improper conduct involves MTB's counsel improperly ending the out of state deposition of Self, a former employee of MTB, for no legitimate reason." (*See* April 4, 2019 Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying Defendant's Motion for Protection (Self and Gatling), at 6). The evidence and law do not support this conclusion.

During the lunch break, Mr. Countryman asked Mr. Kahn how long he expected the deposition to take, and Mr. Kahn refused to provide even a best guess. (*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 15-16). Mr. Countryman then told Mr. Kahn that he needed to complete the deposition by 3:00 p.m. (*See id.*). This gave Mr. Kahn three more hours to depose the witness. Mr. Kahn ignored this and refused to discuss the issue further. (*See id.*). When the deposition resumed, Mr. Countryman requested on the record that Mr. Kahn complete the deposition by 3:00 p.m.:

> MR. COUNTRYMAN: Real quick, I just want to make a quick statement for the record. I've talked to plaintiff's counsel and the deposition is going to be ended at 3:00. The witness has things she needs to do at work, and I need to get home.
>
> We're here by agreement, and we've agreed to be here without a subpoena, and that's what's happening.
>
> MR. KAHN: I don't agree with that, and you didn't inform me to the -- of the fact that you said you needed to leave at 3:00 until just a few moments ago during the break.
>
> We'll go forward, and the judge can deal with it.

---

[6] Judge Murphy's Sanctions Order does not explain or discuss the applicability of Rule 30(j)(8) or state how Mr. Countryman misapplied it. Appellant hopes that the Court will seize this opportunity to clarify the proper application of Rule 38(j)(8).

(*See* February 7, 2019 Plaintiffs' Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2, at 92:13-93:1). Ultimately, the witness departed the deposition at approximately 3:00 p.m. (*See id.*, at 224:18-226:4).

In the South Carolina attorney's oath, lawyers promise "[t]o opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." However, despite the multiple courtesies Mr. Countryman afforded Mr. Kahn with respect to that deposition, Mr. Kahn refused to extend any courtesy to Mr. Countryman or the witness.

In contrast, MTB and its attorney made numerous accommodations to Richardson in connection with Ms. Self's deposition. For example, it agreed to Ms. Self's appearance in Georgia without a domesticated subpoena. Additionally, Mr. Countryman allowed the deposition to proceed, even though the South Carolina court reporter could not place the witness under oath in Georgia. *See* S.C.R. Civ. P. 30(c) ("The officer before whom the deposition is to be taken shall put the witness on oath . . . ."). After it became clear that Mr. Kahn could not obtain a Georgia on such short notice, Mr. Countryman "kindly" allowed a notary to swear in Ms. Self:

> An issue was -- or a question was raised by defense counsel, prior to the deposition starting, about the fact that the court reporter, who's been involved with many of the depositions in this case, is not a notary in the state of Georgia.
>
> We have -- he has kindly agreed to allow us to have a Georgia notary swear the witness in, which has just taken place, and Teri will transcribe and prepare the deposition. So any issue about that is not an issue or has been waived.

(*See id.*, at 7:13-22).

Mr. Countryman also allowed the deposition to go forward, even though Mr. Kahn had directly contacted the Ms. Self without permission. (*See* March 1, 2019 MTB's Brief in Opposition to Plaintiff's Motion for Sanctions, at 5 ("Unbeknownst to me, Mr. Kahn contacted Ms. Self, who is now a legal assistant at a law firm in Macon, Georgia, directly to discuss the case and her deposition. He did not ask if I represented Ms. Self or involve me in the discussions with her until after her boss agreed that she would give a deposition.")). While this conduct might not

have technically violated the Rules of Professional Conduct, it was at least unfair to Mr. Countryman and his client.

Contrary to Judge Murphy's Sanctions Order, Mr. Countryman had legitimate reasons for terminating Ms. Self's deposition, because she — having been deposed for hours — needed to work. Additionally, Mr. Countryman had responsibilities relating to his newborn. The suspension of the deposition was not designed to thwart or interfere with Plaintiff's discovery. It was not intended to insulate Ms. Self from fully testifying. It has not interfered, in any way, with Richardson's ability to investigate her claims. Far from being sanctionable, Ms. Self's departure from her deposition was for wholly legitimate reasons. The mere fact that Mr. Kahn did not agree with those reasons does not make MTB's counsel's conduct sanctionable or obviate Mr. Kahn's duty to act with civility and fairness. Judge Murphy erred in imposing sanctions on MTB in connection with the conclusion of Ms. Self's deposition.

CONCLUSION

This Court should reverse Judge Murphy's imposition of sanctions on MTB and order Richardson to return the money paid pursuant to the Sanctions Order. This appeal presents an opportunity for the Court to analyze Rule 30(j)(8) and guide South Carolina Attorneys regarding deposition conduct.

August 19, 2019

BARNWELL WHALEY PATTERSON & HELMS, LLC

By:_____

M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

and

Robert P. Wood, Esq.
Joshua R. Hinson, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202
(803) 771-7900
Counsel for Appellant McCabe, Trotter & Beverly, P.C.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the Ninth Circuit

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000671

Tammy C. Richardson .....Respondent

v.

Halcyon Real Estate Services, LLP and McCabe, Trotter & Beverly, P.C. ..... Defendants

Of whom McCabe, Trotter & Beverly, P.C. is the .....Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant McCabe, Trotter & Beverly, P.C. on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 19, 2019, addressed to her attorneys of record:

Justin Kahn, Esq.
Kahn Law Firm, LLP
562 Savannah Highway
Charleston, South Carolina 29407

Mary Leigh Arnold, Esq.
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464
Attorneys for Respondent Tammy C. Richardson

BARNWELL WHALEY PATTERSON & HELMS, LLC

By:_____
M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.

John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON &
HELMS, LLC
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
Counsel for Appellant McCabe, Trotter & Beverly, P.C.

BARNWELL WHALEY
PATTERSON & HELMS LLC
80 YEARS 1938-2018
Attorneys for businesses & professionals since 1938

Justin P. Novak, Esquire
jnovak@barnwell-whaley.com
Charleston Office

August 19, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: **Tammy Richardson v. Halcyon Real Estate**
Appellate Case No. 2019-000671
Our Matter No. 2116.160

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of each of the following:

(1) Initial Brief of Appellant;

(2) Appellant's Designation of Matter for Inclusion in the Record on Appeal; and

(3) Proofs of Service.

Please file the originals and return clocked copies to me in the enclosed envelope.

By copy of this letter, I am serving a copy of the Initial Brief and Designation upon counsel of record.

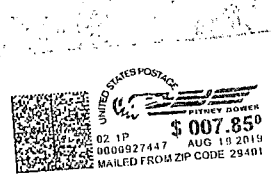
Sincerely,

Justin P. Novak

JPN/jgc
Enclosures

cc: Justin S. Kahn, Esquire
Mary Leigh Arnold, Esquire
Robert P. Wood, Esquire

{00927007.DOCX.1 }



BARNWELL WHALEY PATTERSON & HELMS LLC
80 YEARS 1936-2016
P.O. Drawer H | Charleston SC 29402-0197

2116.160
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201