THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

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Case No. 2016-CP-18-1001
Appellate Case No. 2019-000671

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Tammy C. Richardson.....Respondent,

v.

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

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



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# INITIAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Rules**

## I. STATEMENT OF ISSUES ON APPEAL

1. **Does The Court Lack Jurisdiction To Hear This Appeal?**

2. **When The Standard Of Review On Appeal Is Abuse Of Discretion And Appellant Does Not Argue Or Show A Necessary Element - Resulting Prejudice, Can The Appellant Obtain Reversal Of The Trial Court Order?**

3. **When Counsel Engages In Impermissible Discussion With A Witness About a Previously Produced Document During A Deposition That Does Not Involve Asserting A Privilege, Does The Trial Court Commit Error Sanctioning Such Conduct?**

4. **When A Trial Court's Order Has Reasonable Factual Support And Appellant Cannot Show Prejudice, Is Reversal Proper?**

5. **When An Attorney Intentionally Interferes With Proper Questioning Of A Witness During A Deposition, Is It Proper For A Trial Court To Award Sanctions?**

## II. STATEMENT OF THE CASE

On April 4, 2019, the Honorable Maite D. Murphy issued an Order ("Discovery Sanctions Order") granting Respondent's Notice and Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel. ("Sanctions Motion") The Sanctions Motion, filed Feb. 7, 2019, asked the Court to redress discovery abuse and misconduct committed during depositions by defense counsel and Stephanie Trotter, Esq., an attorney with McCabe Trotter and Beverly, PC ("MTB" or "Appellant"), who attended the depositions. Respondent complained that counsel for MTB and the MTB attorney disrupted depositions, engaged in witness coaching, held impermissible off-the-record discussions with witnesses about documents that were previously produced in discovery, and improperly instructed a witness to leave a deposition before it concluded. The Court granted the Sanctions Motion.

In sum, the Court ordered the depositions of two witnesses, Haylen Gatling and Sheri Self be reconvened and continued at the expense of MTB. The Order further directed that the deposition of the MTB attorney who participated in the improper behavior and disruption, be completed unimpeded and at the expense of Appellant.

Appellant moved to reconsider the Discovery Sanctions Order. Relief was denied on April 26, 2019. (Order Denying Reconsideration).

In compliance with the Discovery Sanctions Order, the parties completed the depositions of all three witnesses. Appellant tendered the expenses incurred and attorney's fees as directed.

## III. STANDARD OF REVIEW - ABUSE OF DISCRETION

The standard of review of this Discovery Sanctions Order is abuse of discretion.[1] "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). 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. *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014). "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,

[1] MTB's contention that the attorney's fees award as part of the sanction is the equivalent of an equitable determination justifying *de novo* review is without support. The attorney's fees were not awarded as part of a separate action. Thus, *de novo* review is not the proper standard.

resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law."[2] *Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted).

## IV. FACTS

### A. Nature of Case

This is a class action Fair Debt Collection Practices Act ("FDCPA") and Unfair Trade Practices Act lawsuit brought against MTB, whose primary practice is the collection of allegedly past due homeowners' assessments on behalf of homeowners associations (HOAs). The suit alleges MTB routinely misrepresents to consumers money owed to HOAs by claiming incorrect and inflated amounts of attorney's fees and then using the bogus numbers to

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[2] *See also* "A [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the [c]ourt of [a]ppeals only if an abuse of discretion has occurred." *Id.* "The burden is upon the party appealing from the order to demonstrate the [circuit] court abused its discretion." *Id.* "An abuse of discretion may be found whe[n] the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (Ct. App. 2018), *reh'g denied* (June 21, 2018), *cert. denied* (Nov. 9, 2018).

threaten foreclosure, forcing homeowners to choose between paying MTB or losing their homes.

This scheme impacts thousands of South Carolina property owners. MTB's improper debt collection practices include generating thousands of form letters falsely claiming consumers owe money to the HOAs, filing notices of liens repeating those misrepresentations, and then foreclosing on homes to collect the misrepresented amounts. The misrepresentations begin with MTB's unsigned form letter showing an attorney's name at the signature line and telling homeowners they "currently" owe their HOA money, including hundreds of dollars in attorney's fees and failing to disclose that MTB never charges the HOA more than $65 or that typically no attorney has actually created or reviewed the letter.

Respondent Tammy C. Richardson ("Richardson" or "Respondent") is one of the few to successfully challenge an HOA foreclosure brought by MTB. Despite the false claims made by MTB about Richardson and her alleged indebtedness, she successfully defended herself against the improper collection and foreclosure action. She has sued the firm for violating the Fair Debt Collection Practices Act and the UTPA. The case has been certified as a class action.

## B. Depositions at Issue

Richardson sought to depose one current and one former[3] MTB non-attorney staff member who printed and sent out thousands of the form letters claiming homeowners owed bogus amounts to their HOAs for attorney's fees. The letters typically contained the name of an attorney at the bottom in the signature block but were not reviewed or prepared by an attorney. The witnesses deposed were the non-attorney staff who generated thousands of these form letters. During their depositions, Respondents presented various dunning letters and other documents to the witnesses so they could explain when, how and under what circumstances the letters were created and sent. All of these documents were previously produced by MTB or Richardson as part of discovery, and many were also used in prior depositions.

When questioning the witnesses who created and printed these form documents, MTB counsel chose to interrupt, stop the deposition and meet with the witness in a private off-the-record conference to discuss the previously produced document. Below are examples of deposition conduct at issue cited in Respondent's Sanctions Motion.

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[3] MTB suggests contact with a former employee was inappropriate and that MTB counsel represented the former employee. These suggestions are unsupported and unpreserved as discussed below.

**[MR. COUNTRYMAN] … I'm taking a brief amount of time to go over the document with the witness before she discusses questions about it with you.**

MR. KAHN: And the rules specifically -- in **the South Carolina Supreme Court specifically prohibit you from engaging in the conduct you have described.** And the basis of what you have asserted, which is to review documents that you claim I sprung on you as a surprise, is not a basis to have an off-the-record conference, and **you are in violation of the rules. These documents have been produced throughout discovery by McCabe Trotter. There's no surprise here. This is a witness who prepared the documents.** But subject to all of that, we can let a judge deal with it.

Ex. 2 - Dep. Self p. 157.

MR. COUNTRYMAN: **And I'm going to tell her not to answer that before we discuss it.**

BY MR. KAHN:

Q Do you see that sentence?

**MR. COUNTRYMAN: So don't answer that.**

MR. KAHN: All right. I --

**MR. COUNTRYMAN: Come with me. We're going to chat about it.**

MR. KAHN: I don't understand the basis of your objection. **These -- this document has been previously produced; right?**

**MR. COUNTRYMAN: Yup.**

MR. KAHN: All right. And **you think the rules allow you to talk with a witness about a document that has been previously produced or identified?**

**MR. COUNTRYMAN: Yes.**

Ex. 2 - Self Dep. p. 21.

MR. KAHN: This has been previously been marked as Trotter No. 24, **which is a document we've produced and provided and been used in the past.**

**MR. COUNTRYMAN: I'm going to talk to her about it before you ask any questions.**

Ex. 2 - Self Dep. p. 172.

[By Mr. Kahn] Q Do you see on the second page where your initials appear?

**MR. COUNTRYMAN: Going to talk to her about this before she answers any questions on it.** If you have anything else you want me to go over with her, I'm happy to do that since --

MR. KAHN: I don't think the rules require that. I think what you're doing is improper. So we can --

MR. COUNTRYMAN: That's fine. But I'm doing it. So I'm telling that ahead of time. If you want me to go over them with -- with her now, I'll do that. If not, **then you can waste more time doing it over the next 30 minutes. That's fine.**

Ex. 2 - Self Dep. p. 194.

The repeated interruptions to discuss previously produced documents off-the-record privately is prohibited and witness coaching. There was no assertion that any discussion was to assert a privilege as to the document shown to the witness. Proper attempts to determine what was discussed during the interruption were improperly blocked.

MTB's counsel claimed the multiple off-the-record discussions with the witness about previously produced documents were "privileged." During the

deposition, when asked to explain, MTB's counsel stated *he* was asserting privilege, *not the witness*.

> 10 MR. KAHN: What privilege could you all have
> 11 been discussing that relates to a document produced to
> 12 us from McCabe Trotter as part of this litigation?
> **13 MR. COUNTRYMAN: I'm the one asserting the**
> **14 privilege, not the witness.** And I'm happy to talk to
> 15 you about it, if you would like.

Ex. 2 - Self Dep. p. 206.

The videos of these depositions were marked as Exhibit 1 at the Hearing on March 4, 2019. March 4, 2019 Hearing Transcript p. 107.

## V. ARGUMENTS

### A. Summary of Arguments

First, the interlocutory Discovery Sanctions Order is not appealable. Second, this appeal is moot because MTB has complied with the order. Third, MTB fails to show the trial court abused its discretion in holding there is no requirement for the deposing attorney to provide *the exact* documents to be used in a deposition at least two days beforehand if they have been previously produced or identified in discovery or that the conduct of MTB's attorney who

repeatedly stopped and interrupted the deposition to discuss previously produced documents violated the Rules.

The law is clear. Once a deposition begins, an attorney and a witness may have an off-the-record conference ***only when deciding whether to assert a privilege*** or ***to discuss a previously undisclosed document.*** *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 190–91, 552 S.E.2d 10, 16 (2001) (emphasis added). As all documents at issue were previously disclosed and produced in the discovery process months or years earlier, Rule 30(j)(8) did not permit MTB's counsel to repeatedly stop and interrupt the deposition to have off-the-record discussions about each of the documents with the witness. MTB has not articulated any facts or reasons to support the claim of surprise or prejudice. Indeed, there is none as the form letter documents were produced by MTB in discovery and typically created by the witness.

The appeal should be dismissed for the reasons stated herein.

**B. MTB Cannot Appeal The Interlocutory Discovery Sanctions Order**

The right of appeal arises from and is controlled by statutory law. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); S.C. Code Ann. § 14-3-330 (2017). "The determination of whether a party may immediately appeal an

order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." *Ex parte Capital*, at 6. "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Hagood*, at 194; S.C. Code Ann. § 14-3-330 (2017); Rule 72, SCRCP; Rule 201(a), SCACR.

MTB fails to cite any statutory law authorizing the immediate appeal of the interlocutory discovery order. Orders directing a party to participate in discovery are interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330. *See, e.g., Lowndes Prods., Inc. v. Brower*, 262 S.C. 431, 433, 205 S.E.2d 184, 185-86 (1974) (recognizing that generally an order denying pretrial discovery is not directly appealable because it is an intermediate or interlocutory decision); *Tucker v. Honda of South Carolina Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003)("an order compelling discovery does not ordinarily involve the merits of the case"); *Hamm v. South Carolina Public Service Com'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994)("An order compelling a party to submit to discovery is interlocutory and not directly appealable."); *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205, 208 (2005)("This discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined.")

Without citing any statutory basis, MTB suggests that this Court should hear the appeal because this matter raises interesting issues.[4] But, "the fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008). "It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E. 2d 533, 537 (2005).

MTB did not argue the Discovery Sanctions Order involves the merits or affects a substantial right. Thus, it is not appealable and this appeal should be dismissed.

### C. Proper Path to Appeal Lies with a Separate Contempt Order Which MTB Did Not Obtain

To challenge the specific rulings of discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding. *See e.g., Ex parte Whetstone,* 289 S.C. 580, 580, 347 S.E.2d 881, 881–82 (1986)("An

[4] MTB argues, without any support, that this appeal "is an area of interest for the South Carolina Bar." Appellant Br. p. 22.

order directing a party to participate in discovery is interlocutory and not directly appealable....He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply.") (internal citations omitted). *Davis v. Parkview Apartments*, 409 S.C. 266, 280–81, 762 S.E.2d 535, 543 (2014). "Contempt results from the willful disobedience of a court order...." *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 606, 790 S.E.2d 430, 433 (Ct. App. 2016). In order to preserve the right to appeal a discovery order a party must refuse to comply with the order, be cited for contempt, and then appeal. *Id.* at 577.

As part of MTB's prior Petition for Writ of *Certiorari* concerning the Discovery Sanctions Order at issue, the Supreme Court held that it is not proper to review the Discovery Sanctions Order. The Supreme Court cited various cases holding that the proper way to appeal a discovery order is to first be held in contempt and appeal that order. Appellate Case No. 2019-000675 Order dated August 2, 2019

MTB did not obtain a contempt order for failing to comply with the Discovery Sanctions Order. Instead, MTB complied, making this appeal moot.

MTB concedes there is no law that a "non-contempt monetary sanction constitutes an immediately appealable final order..." Appellant Br. p. 20. Instead, MTB suggests the Discovery Sanctions Order is like an order issued as a result of a merit hearing or in a contempt proceeding and this Court should consider federal circuit court of appeal decisions to determine that it is appealable. As discussed above, the Supreme Court makes clear that the procedure in South Carolina state court to appeal a discovery order is to disobey it, be held in contempt and then appeal that contempt order. "To challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014).

MTB failed to follow the proper path to appeal the Discovery Sanctions Order by being held in contempt for failing to comply with it. Reference to what may be the procedure in federal circuit courts that exist under a different statutory scheme is neither relevant nor binding. Thus, the appeal is improper and should be dismissed.

### D. MTB's Compliance with Discovery Sanctions Order Makes Appeal Moot

A party waives the right to challenge a discovery order on appeal if it complies with the order. *Tucker v. Honda of South Carolina Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003). MTB chose to comply with the Discovery Sanctions Order and the depositions have gone forward.

As argued, in order to preserve the right to appeal a discovery order, a party must refuse to comply with the order, be cited for contempt and then appeal. *Id.* at 577. MTB does not contend that this is a matter "capable of repetition, but which usually becomes moot before it can be reviewed." *S.C. Dep't. of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990).

MTB failed to follow the "proper" path to appeal. As such, the appeal should be dismissed as moot.

### E. MTB Offers a Unique and Unsupported Argument To Justify Its Improper Conduct

As to documents previously produced or identified in discovery, MTB argues it was completely proper to engage in off-the-record private conferences with a witness during a deposition because deposing counsel did not explicitly *reproduce or identify the exact* documents to be used during a witness deposition at least 2 days before the deposition. MTB has never cited any rule or case law

that requires one produce the *exact* documents to be used in a deposition prior to the deposition *when the documents to be used have been previously produced or identified in discovery*. Richardson argued this to the Court:

> Mr. Countryman is not complaining that I gave him documents that he had never seen before or that were never identified. He is complaining I didn't provide him with ***the exact documents*** that I might use in the deposition. There's no rule that requires that.

Transcript Hearing March 4, 2019, pp. 88, lines 14-19 (emphasis added).

It was argued that MTB's position was unsupported by case law or the rules. Transcript Hearing March 4, 2019, pp. 82, lines 14-19.

MTB made the unsupported argument to the Court that:

> If the lawyer deposing the witness does not produce or identify those documents ***that he's going to use in the deposition*** two days ahead of time, the lawyer for the witness has the right to briefly discuss the documents privately with the witness.

Transcript Hearing March 4, 2019, p. 79, lines 20-24 (emphasis added).

As to documents to be used in a deposition, MTB argues the attorney defending the deposition is entitled to know *exactly* "what you're going to use with the witness" and that the failure to provide the *exact* documents to be used creates surprise. Transcript Hearing March 4, 2019, p. 81, 12-15.

The position is meritless and unsupported by Supreme Court case law or any rule. Similarly, when one questions a witness at trial, there is no requirement that the attorney provide *the exact* list of documents to be used with *that witness* ahead of time. MTB's argument should be disregarded.

**F. MTB Cannot Show Trial Court Abused Discretion**

MTB has not articulated any prejudice to the witness or MTB or how the Court's ruling resulted in prejudice. There is none. This is fatal to MTB's appeal as prejudice must be shown to prove an abuse of discretion.

There is no abuse of discretion because the trial court correctly determined it is improper for an attorney to meet with a witness in the middle of a deposition to have off-the-record discussions about previously produced documents without any intent of deciding whether to assert a privilege. Further the trial court correctly held, if there is a discussion, deposing counsel is specifically allowed to inquire about the discussion and the witness must respond accordingly. The trial court properly determined it is not proper for the attorney to instruct the witness not to answer or refuse to state what was discussed.

The Supreme Court explained this long ago.

> 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.
>
> Off-the-record conferences not specifically permitted by the rule are not allowed whether they are called by the deponent's attorney or the deponent. "There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur." *Hall,* 150 F.R.D. at 528. According to our rule, even during breaks in the deposition such as a lunch or overnight break, witnesses and their counsel cannot talk substantively about prior or future testimony in the deposition. *See* Rule 30(j)(5), SCRCP.

*In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 190–91, 552 S.E.2d 10, 16–17 (2001).

As stated in the 2000 note to SCRCP, Rule 30(j) "The intent of the amendment is to help eliminate conduct tending to interfere with or impede depositions."

As the trial court's order has reasonable factual support, MTB cannot meet its burden of showing abuse of discretion. The trial court cited facts showing improper obstructive behavior occurred during the depositions. Sanctions Order pp. 1, 4-8 citing the conduct stated in Plaintiff's Memorandum.

MTB does not claim that during the deposition, when a document was provided to the witness it was not contemporaneously provided to MTB counsel as required. Instead, MTB seeks to add a requirement not appearing in the language of the rule and misinterpret existing language. MTB claims that a deposing attorney must *specifically identify and produce* each document to be used in a deposition of a witness two days before even when the documents have been previously produced or identified in discovery.

No rule requires the disclosure of attorney work-product like listing the specific documents to be used in a deposition ahead of time. Further, depending on what takes place at a deposition, a witness may say something that makes many documents thought to be needed unnecessary or just the opposite. A

witness may testify unexpectedly and there be a need to use previously produced documents in a way not anticipated prior to the deposition.

Instead of arguing the trial court's decision was without reasonable factual support, MTB incorrectly reargues that Rule 30(j)(8) requires *that even as to previously produced documents*, every single document that is to be used in the deposition be produced to the attorney on the other side at least two days before the deposition begins. If the documents are not specifically reproduced or identified for the deposition, MTB argues counsel can stop the deposition and engage in private off-the-record discussions with the witness that have nothing to do with deciding whether to assert a privilege without having to disclose what took place. No law supports that. Judge Murphy correctly analyzed the facts and law in the reasoned order:

> During a deposition, the only permissible discussion between counsel and a witness that may take place if it does not involve deciding whether to assert privilege is to discuss a previously undisclosed document. *In re Anonymous Member of S.C. Bar*, at 190-191, 16. (emphasis added). The law is clear: Conferences called to assist a witness in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions. *In re Anonymous Member of S.C. Bar*, at 191, 17. If there is a permissible basis for meeting with the witness, "[b]efore 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." *In re Anonymous Member of S.C. Bar*, at 191, 16. When there is an off-the-record conference, 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. *In re Anonymous Member of S.C. Bar*, at 191, 16.

Given the clear pronouncement of the Supreme Court and the fact that improper discussions about previously produced documents took place with subsequent instructions preventing legitimate inquiry, the Discovery Sanctions Order was not an abuse of discretion. It was not abuse of discretion to determine the conduct of MTB's counsel was improper as it impaired or impeded the deposition in violation of the law and Rules.

**G. Trial Court Properly Sanctioned Repeated Deposition Misconduct**

As argued above, the trial court properly held that the impermissible conduct warranted sanctions because MTB counsel repeatedly failed to state an approved basis for stopping the deposition to have an off-the-record discussion *before* beginning the conference as required. The only proper basis of having a conference is limited to discussing whether to assert a privilege or review a newly produced document. There was no discussion about asserting a privilege or to discuss a previously unproduced document. *See e.g.* Self Dep. p. 94, p. 206.

Thus, MTB has not shown that the trial court abused its discretion because facts exist to support the decision to impose sanctions.

**H. Court Properly Determined Improper Witness Coaching Occurred**

Based on the facts presented, the trial court properly determined that improper witness coaching occurred by MTB Counsel and Stephanie Trotter, Esq. which, in part, resulted in changed testimony. *See e.g.* Order p. 5.

> An example of the effects of the improper off-the-record discussions and witness coaching involve the change in testimony of Gatling after meeting with defense counsel and Stephanie Trotter, Esq. (Trotter) of MTB who attended Gatling's deposition. Prior to an off the record meeting, as to the MTB collection process, Gatling testified she printed documents, including various parts of a form letter package and "would pull two of the pages, the notice of lien and the witness page" and put those in a box with others for Trotter to review. Dep. Gatling p. 175, 17-23; p. 176, 2-6. After improperly meeting with MTB counsel and Trotter to discuss documents, the witness returned and testified she had suddenly "misremembered" the way documents were put in the box for the MTB attorney Trotter to sign. Gatling Dep. pp. 199-200. The impropriety of the meetings was noted on the record. *See. e.g.* Gatling Dep. pp. 182-187. When Plaintiff's counsel asked what was discussed, the witness was improperly instructed not to answer by MTB counsel.

To justify the prohibited conduct, MTB makes unsupported arguments like — a witness will be better prepared to answer questions only after meeting

with counsel to make the witness "familiar with the document." Appellant Brief, p. 28. MTB's other unsupported and not previously made arguments include meeting with the witness was needed to "make sure they were adequately prepared to give complete and truthful testimony..." Appellant Brief, p. 30. These excuses for meetings are not in line with how the Supreme Court views the role of an attorney and witness deposition testimony.

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did - what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness.

*In Re Anonymous* at 17.

MTB's repeated and unsupported suggestion is that it is unfair to put the witness in the position of having to answer questions about documents she created without input from counsel in the middle of the deposition or before because it "places an impossible burden on a party preparing the witness..." Appellant Brief, p. 28.

MTB fails to state any basis as to why an off-the-record discussion about a form document created, print and sent by that witness which was produced in discovery by MTB was needed. The reasons stated for the first time on appeal,

including to increase the witness' knowledge about such a document, are without merit.

Further, MTB is for the first time on appeal arguing against precedent by suggesting that it is for the attorney to help formulate answers based on documents previously produced and created by the witness. MTB ignores the simple truth as stated by the Supreme Court in *In Re Anonymous* at 192, 17:

> The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness - not the lawyer - who is the witness.

When there is no claim that the document was not previously produced in discovery and no privilege as to the document is to be asserted, MTB improperly engaged in a private conference with the witness. Under MTB's theory, who needs a witness? The trial court did not commit error.

## I. Local District Court Rules Do Not Support Counsel for MTB's Behavior

*After* the circuit court alerted the parties how it would rule on the discovery motion, MTB suggested that the trial court look to the federal court's interpretation of the local district court's rules and consider discovery orders from United States District Judge Joseph F. Anderson, Jr.

Richardson explained to the circuit court that Judge Anderson's orders were not applicable.

> Now, after the briefs, argument and the Court's decision as stated in the email of March 28, 2019, counsel provides orders from United States District Judge Joseph Anderson, Jr. Those orders rely on a different Federal Rule concerning deposition conduct and resulted from a motion filed *prior* to a deposition to prevent opposing counsel from conferring with the witness *at all* during the deposition. The Court merely held that it would not prevent an attorney defending the witness from meeting to discuss *whether to assert a privilege*. The Court held "it is reasonable for [deponent] and her counsel to be afforded a reasonable amount of time to review any document as necessary *to determine whether the document or whether King's answers to questions on the document would be protected by a privilege*." (emphasis added).
>
> April 2, 2019 Letter Filed 2:52 p.m.

MTB's repeated reliance on Judge Anderson's orders are misplaced. The district court *never* held the use of previously produced documents violated any rule or law or authorized unfettered discussion with the witness about the documents during a deposition. The Court merely held it would not preemptively prevent counsel from conferring with a client during a deposition *to determine whether to assert a privilege* as to the document. Meeting to decide whether to assert a privilege is not the issue here.

The District Court did not hold that the method or way documents identified by counsel was improper, violated the applicable federal rule or authorized the attorney to have off-the-record discussions with the witness other than to determine whether to assert a privilege. In short, the orders MTB cites only authorize an attorney to confer with a witness during a deposition to discuss a previously produced or identified document *to determine whether to assert a privilege.* April 2, 2019 Letter Filed 2:52 p.m.

Determining whether to assert a privilege was not and has never been an issue that was raised by MTB. The off-the-record conferences were designed to and had the impact of impeding and affecting witness testimony. They were prohibited.[5]

Nothing stopped MTB counsel from asking questions of the witness *during the deposition on the record* following Richardson's questions. At that time, MTB counsel could try to establish testimony thought proper, including whether the witness was familiar with the documents, understood the words, remembered specifics, *etc.* Instead of properly waiting his turn, in a blatant

[5] It is interesting to note that even when a list was provided of documents to be used, MTB claimed it contained too many items. The point is that alleged failure to provide a list or documents to be used ahead of time is just an excuse for the unauthorized off-the-record discussions and witness coaching.

disregard of the clear mandate of the Supreme Court, counsel repeatedly stopped the deposition to discuss previously produced documents which, as the trial court found, had the prejudicial and detrimental effect of interfering with the flow of the deposition, changing testimony and obstructing the truth-seeking function of the process. The trial court properly found this impermissible conduct occurred based on the facts. MTB fails to show the trial court findings are not supported. Thus, an abuse of discretion has not been shown.

### J. MTB's Claim of Privilege and Impropriety of Contacting Witness by Richardson's Counsel is Meritless

As to the deposition involving a former employee of MTB Ms. Self, MTB now argues that its counsel "represented the witness" to try to justify the claim that the private discussions were somehow privileged. Appellant Brief, p. 32. This contradicts the direct testimony of the witness and statements made by MTB counsel at the beginning of the deposition before the improper discussions and witness coaching took place.[6]

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[6] MTB counsel did not state he represented the witness at the beginning of the deposition. "I'm Andy Countryman. I represent McCabe, Trotter & Beverly." Self Dep. p. 6, lines 24-25. The witness agreed she did not hire him to be her lawyer, did not pay him a retainer or sign any legal agreement. Self Dep. p. 24.

Nonetheless, as discussed above, once a deposition begins, off-the-record discussions about previously produced documents with the witness are subject to proper inquiry by deposing counsel. There was not and has never been any claim that the discussions concerning the document were to decide whether to assert a privilege about the document.

In an attempt to muddy the waters, it is interesting that MTB now suggests that Richardson's counsel's contact with the former MTB employee was somehow improper. It was not. There is no support that the contact with the former employee was anything other than proper.

As can be shown by the e-mail with Ms. Self's boss and contrary to the position now taken, MTB counsel had nothing to do with coordinating or facilitating the deposition with the witness.

Richardson's counsel spoke with Ms. Self's employer, an attorney in Georgia, about coordinating the deposition with her schedule. *See* July 18, 2018 email Nelson to Kahn Ex. 4 to motion. It was agreed that no subpoena would be necessary and that the law office where Self worked could be used for the deposition. Further, no time limit was ever set or agreed to. Mr. Nelson stated that it was preferable to conduct the deposition during office hours and not go past 5:30 p.m. but that there was no implication that Self "would seek to limit

the length of the deposition." *Id.* The e-mail stating the agreement not requiring a subpoena and having the deposition in Georgia without a time limit at her office was simultaneously copied to MTB counsel. Thus, there was no improper communication.

The rules of ethics related to communication with a corporation represented by counsel supports the complete propriety of Richardson's counsel's actions. Comment 7 to SCACR, Rule 4.2 makes this clear. "Consent of the organization's lawyer is not required for communication with a former constituent." Thus, any suggestion by MTB that there was improper conduct in communicating with Self or scheduling this deposition is nothing more than smoke to distract from the real issues involving improper witness coaching.

## VI. CONCLUSION

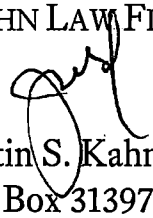
The record supports the determinations made in the Discovery Sanctions Order. MTB counsel and Stephanie Trotter, Esq. improperly impeded and impaired the deposition process. Attempts to distract from that fact should be disregarded. MTB's conduct was not justified. Instead of complying with the clear directive of the Supreme Court concerning deposition conduct, MTB

makes up language and glues it together with bits and pieces of the Rules and case law in an effort to justify its improper conduct and witness coaching.

The appeal should be dismissed for the reasons stated herein, including that the appeal is interlocutory.

Even if the Court decides the matter was properly appealed, the Court should determine that the trial court correctly sanctioned the improper behavior and there is no basis to reverse or modify that decision.

KAHN LAW FIRM, LLP



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CHARLESTON, SC
DECEMBER 5, 2019

**STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

**Appeal from Dorchester County**
**Court of Common Pleas**
**Hon. Maite Murphy, Circuit Court Judge**

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**Case No. 2016-CP-18-1001**



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Tammy C. Richardson, Respondent,

v.

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

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

Appellate Case No. 2019-000671

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**PROOF OF SERVICE**

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**Tammy C. Richardson**

Charleston, SC
December 5, 2019

I, Justin S. Kahn, do hereby affirm that on December 5, 2019, I served one copy of Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal, on the following below named individuals by placing a copy in the United States Mail, first class, postage prepaid:

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December 5, 2019

Hon. Jenny Abbott Kitchings
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South Carolina Court of Appeals
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**Re: Tammy C. Richardson v. McCabe, Trotter & Beverly, P.C.**
**Appellate Case No.: 2019-000671**

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal, along with Proof of Service. By copy of this letter I am serving these documents on counsel for Appellant.

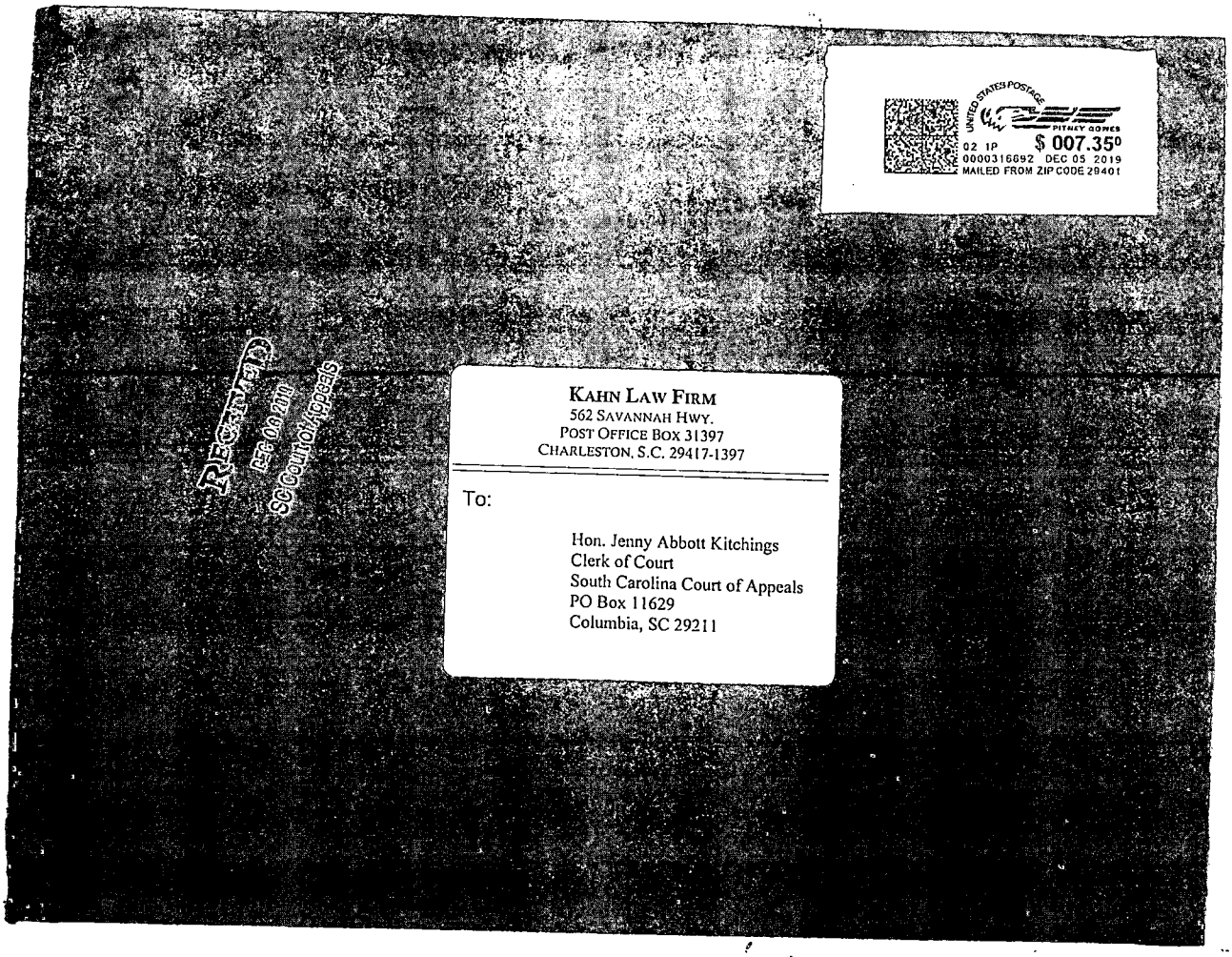
Please file the original copy, mark the extra copy filed and return it to us in the enclosed, postage-prepaid envelope.

With best regards, I am

Yours sincerely,

Justin S. Kahn

JSK/pm
Encl.
cc: M. Dawes Cooke, Jr., Esq.
Robert P. Woods, Esq.
Joshua R. Hinson, Esq.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