

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Carolina Cool, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Garrard Construction Group, Inc., Dave &)
 Buster's of South Carolina, Inc. and)
 Broadway at the Beach, Inc., and Billys)
 Plumbing Company LLC,)
)
 Defendants.)
)
 _____)
 Garrard Construction Group, Inc.,)
)
 Third-Party Plaintiff,)
 vs.)
)
 RLI Insurance Company,)
)
 Third-Party Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-26-03562

Order Granting Plaintiff's Motion for
Sanctions and Striking Counterclaim of
Defendant Garrard Construction Group, Inc.

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Order Granting Motion for Sanctions and Striking Counterclaim

This matter came before the Court on December 18, 2019 pursuant to Plaintiff's Motion for Sanctions Against Defendant Garrard Construction Group, Inc. filed November 4, 2019. Present at the hearing were Mark Neill, counsel for Plaintiff Carolina Cool, Inc. Andrew Countryman, counsel for Defendant Garrard Construction Group, Inc., was also present. After hearing oral arguments, reviewing the facts presented and the record, the Court GRANTS Plaintiff's Motion for the following reasons:

Summary of Facts

This case arises from the construction of the Dave & Buster's restaurant located at Broadway at the Beach in Myrtle Beach. Garrard Construction Group, Inc. (Garrard) was hired

by Broadway at the Beach, Inc. (Broadway), the owner of the real property, to build the outside shell of the building. Garrard was also hired by Dave & Buster's of South Carolina Inc. (Dave & Buster's), the tenant leasing the space from Broadway, to build the interior of the building. As such, Garrard was the general contractor for both the shell and interior portions of the building. On September 1, 2016, Garrard entered into a written contract to do the shell work for Broadway for a fixed price amount \$4,994,912.00.¹ On October 25, 2016, Garrard entered into a written cost-plus contract to do the interior work for Dave & Buster's for approximately \$3,628,786.00.²

Garrard contracted with Carolina Cool, Inc. (Carolina Cool) to provide plumbing for both the shell and interior portions. Garrard and Carolina Cool entered into a subcontract dated October 19, 2016 for the shell (shell subcontract) in the amount of \$36,450.00.³ The shell subcontract price was increased to \$36,450.00 due to a subsequent change order.⁴ Thereafter, on November 18, 2016, the parties entered into a subcontract for the interior (interior subcontract) in the amount of \$294,688.00.⁵

Carolina Cool was scheduled to begin work for the building's shell on November 9, 2016 and the building's interior on December 26, 2017. However, due to delays on the project, Carolina Cool's start dates were pushed back. Carolina Cool was not able to begin its shell work until December 29, 2016 and its interior work on January 3, 2017. On January 20, 2017, Garrard terminated Carolina Cool's interior subcontract and removed Carolina Cool from the project. Garrard hired Billys Plumbing Company LLC (Billys Plumbing) to replace Carolina Cool.

¹ Broadway Contract dated 9-1-2016, Defendant 1. Exhibit 1.

² Dave & Buster's Contract dated 10-26-16, Defendant 45. Exhibit 2.

³ Carolina Cool Shell Subcontract dated 10-19-16, Plaintiff 159. Exhibit 3.

⁴ Change Order to Carolina Cool Shell Subcontract dated November 22, 2016, Plaintiff 278. Exhibit 4.

⁵ Carolina Cool Interior Subcontract dated 11-18-16. Plaintiff 179. Exhibit 5.

Carolina Cool alleges Garrard breached both the shell and interior subcontracts by removing them from the project without justification and failing to pay for the work and materials already provided. Garrard alleges Carolina Cool breached the interior subcontract by not meeting the agreed upon schedule. Garrard further alleges it hired Billys Plumbing to correct and complete the plumbing at additional costs. On April 12, 2017, Carolina Cool filed its Mechanic's Lien in the amount of \$113,350.00 for the value of the work it performed and materials.

Procedural History

Carolina Cool filed its initial Summons and Complaint on June 8, 2017. Garrard, Broadway, and Dave & Buster's filed their Answer and Garrard filed its Counterclaim and Third Party Complaint on July 6, 2017. Attorney Andrew Countryman represents all three Defendants due to indemnification clauses in the contracts between Garrard, Broadway, and Dave & Buster's. By way of a Consent Order filed April 30, 2019, Plaintiff filed its Second Amended Summons and Complaint on May 3, 2019 naming Billys Plumbing as an additional Defendant. On May 10, 2019, Garrard, Broadway, and Dave & Buster's filed their Answer and Garrard refiled its Counterclaim and Third-Party Complaint. Carolina Cool filed its Reply on May 22, 2019; RLI Insurance filed its Answer on May 23, 2019; and Billys Plumbing filed its Answer on June 27, 2019.

The parties have engaged in lengthy and extensive discovery. The record reflects the filing of several motions to compel. There is also a prior Order awarding Carolina Cool sanctions due to Garrard's failure to cooperate in the scheduling of its witnesses' depositions. The current motion before the Court was filed by Carolina Cool after receiving what it describes as a "document dump" from Garrard on September 30, 2019. Carolina Cool's Motion for Sanctions against Garrard was filed on November 4, 2019.

FINDINGS OF FACT

A. Garrard's Discovery Responses:

Carolina Cool served its initial discovery requests on September 28, 2017.⁶ On November 28, 2017, Garrard, Broadway, and Dave & Buster's responded.⁷ Of particular relevancy are the following responses by Garrard:

6. Identify by specific amount, all damages you are claiming in this case.

ANSWER:

(a) \$102,091.78, which is the cost difference to hire Billy's plumbing to perform the work that Carolina Cool contracted to perform on the interior portion of the project. Comprised of:

a. \$71,553.03 and the cost to complete the under-slab plumbing work and corrections to the under-slab plumbing work that Carolina Cool installed incorrectly.

b. \$8,856.25 Garrard was forced to pay ASE (steel erectors) to erect the steel with a large crane resulting from Carolina Cool's inability to complete the under-slab plumbing rough-ins per schedule.

c. \$21,682.50 in General Conditions costs resulting from Carolina Cool's non-performance.

(b) Consequential damages

(c) Lost profits

(d) Attorney's fees TBD

(e) Punitive damages

12. Any and all estimates and contracts evidencing the hiring of subcontractors "to correct and complete Plaintiff's incorrect and incomplete work at the project" as alleged in paragraph 43 of Defendants' Answer and Garrard's Counterclaim and Third-Party Complaint.

RESPONSE: All responsive material in Defendants' possession/control is included in its production with these responses.

13. Any and all invoices or other documentation evidencing requests for payment received from the subcontractors allegedly hired by Garrard Construction Group, Inc. "to correct and complete Plaintiff's incorrect and incomplete work at the project" as alleged in paragraph 43 of Defendants' Answer and Garrard's Counterclaim and Third-Party Complaint.

RESPONSE: All responsive material in Defendants' possession/control is included in its production with these responses.

14. Any and all correspondence, emails, notes, voice mails or other forms of communications, whether to or from, between one or more of the Defendants and the subcontractors allegedly hired by Garrard Construction Group, Inc. "to correct and complete Plaintiff's incorrect and incomplete

⁶ Plaintiff's Initial Interrogatories and Requests for Production dated 10-3-17. Exhibit 6.

⁷ Defendants' Answers to Interrogatories and Responses to Requests for Production dated 11-28-17. Exhibit 7.

work at the project” as alleged in paragraph 43 of Defendants’ Answer and Garrard’s Counterclaim and Third-Party Complaint.

RESPONSE: All responsive material in Defendants’ possession/control is included in its production with these responses.

In its document production, Garrard produced only two subcontracts with Billys Plumbing— a representation recently proven false as discussed in further detail below. The first was a subcontract dated February 3, 2017 for interior work in the amount of \$350,197.33.⁸ Three change orders to that subcontract were also produced: change order dated April 13, 2017 in the amount of \$4,294.39;⁹ change order dated May 12, 2017 in the amount of \$23,237.22;¹⁰ and change order dated May 31, 2017 in the amount of \$1,679.52.¹¹ The second subcontract was dated February 28, 2017 for shell work in the amount of \$36,884.00.¹² No emails or correspondence between Garrard and Billys Plumbing were produced.

Garrard also produced a summary of its damages, Defendants’ 000586,¹³ showing how it calculated its counterclaim for damages. In addition to the cost difference between its subcontracts with Carolina Cool and Billys Plumbing, there was a reference to general conditions costs in the amount of \$21,682.50 allegedly due to a three week delay caused by Carolina Cool.

In reviewing the discovery responses, it became clear to Carolina Cool that not all relevant documentation had been produced. For example, Garrard produced daily jobsite reports for only a few days of the project when Carolina Cool was on site. Garrard failed to produce daily reports for the time period before and only a few after Carolina Cool was terminated. There was no documentation regarding any alleged delays with the completion date for the project.

⁸ Billys Plumbing Interior Subcontract dated 2-3-17, Defendants 434. Exhibit 8.

⁹ Change Order #1 dated 4-13-17, Defendants 431. Exhibit 9.

¹⁰ Change Order #2 dated 5-12-17, Defendants 432. Exhibit 10.

¹¹ Change Order #3 dated 5-31-17, Defendants 433. Exhibit 11.

¹² Billys Plumbing Shell Subcontract signed 3-16-17, Defendants 465. Exhibit 12.

¹³ Garrard’s Calculation of Damages, Exhibit 13.

In January 2018, Carolina Cool served additional, more specific discovery requests in an attempt to receive information and documentation.¹⁴ Defendants responded on February 20, 2018 and produced an additional 754 documents Bates stamped Defendants 000587 – Defendants 01341.¹⁵ Of particular relevancy are the following responses:

16. Set forth the total amount of monies paid to Billy's Plumbing Company, Inc. for services and materials provided for the Dave & Buster's Myrtle Beach Interior Project.

ANSWER: Garrard paid Billy's a total of \$379,408.46. See Defendants 000589 – 598 produced with these responses.

17. Set forth the total amount of monies paid to Billy's Plumbing Company, Inc. for services and materials provided for the Dave & Buster's Myrtle Beach Shell Project.

ANSWER: Garrard paid Billy's a total of \$379,408.46. See Defendants 000589 – 598 produced with these responses.

19. With regard to the Dave & Buster's Myrtle Beach Project, set forth whether or not any jobsite meetings were ever conducted by Defendant Garrard Construction Group, Inc.; and if so, for

each jobsite meeting, provide the following information:

- a. The date of the meeting;
- b. The subject matter of the meeting, i.e. worker safety, scheduling;
- c. Identify individuals present for the meeting;
- d. Were any notes regarding the meeting generated, and if so, who has possession of the notes.

ANSWER:

(a) Yes. The initial coordination meeting for the interior took place 12/7/17. Allen Anderson of Carolina Cool attended. Bill Bromley coordinated a weekly subcontractor meeting every Tuesday morning which all trade foremen are required to attend.

(b) The Tuesday coordination meetings relate to scheduling, two-week "look ahead," requests for information, percentage of trade work completion and safety.

(c) Carolina Cool's on-site foreman refused to participate in the weekly meetings.

(d) This is a verbal on-site meeting. Some notes may have been taken but have not been located. This is a meeting for foremen to ask questions and receive direction from the superintendent.

In subsequent discovery responses provided by Billy's Plumbing after it was made a party, Carolina Cool learned Garrard's answers to Interrogatory #16 and #17 were false as discussed in more detail below. Furthermore, in its answer to Interrogatory #19(c), Garrard falsely accused

¹⁴ Plaintiff's Supplemental Interrogatories and Requests for Production dated January 16, 2018. Exhibit 14.

¹⁵ Defendants' Answers to Supplemental Discovery Requests dated February 20, 2018. Exhibit 15.

Carolina Cool's foreman of refusing to attend weekly meetings. Garrard's interior superintendent, William Bromley, admitted during his deposition taken April 16, 2019 that he did not even schedule any meetings during the time Carolina Cool was on the project and that he was not aware of any meetings Carolina Cool failed to attend.¹⁶ The answer also referenced the existence of documentation still not produced regarding scheduling, two-week "look ahead", and percentage of trade work completion.

In November 2018, Carolina Cool served supplemental discovery requests.¹⁷ Defendants responded on March 14, 2019.¹⁸ The responses included an additional 4,232 photographs and an additional 1,632 pages of documents related to project including weekly reports, correspondence, calendars, notes, and payments. Unbeknownst to Carolina Cool, Garrard still held back critically relevant documents as discovered during the deposition of witnesses discussed below.

B. Subpoenas Issued to Billys Plumbing:

On July 18, 2018, Carolina Cool served its second subpoena on Billys Plumbing. In response, Billys Plumbing filed a Motion to Quash on July 31, 2018. A hearing was scheduled for October 9, 2018. On the day before the hearing, Garrard's attorney emailed counsel for Carolina Cool and Billys Plumbing informing them he would not be present for the hearing and that he was providing all his client's documents related to Billys Plumbing consisting of 87 pages.¹⁹ Carolina Cool later discovered Garrard's representation that it only had 87 pages of documents regarding Billys Plumbing was a blatant falsity. Garrard continued to falsely represent it only had two subcontracts with Billys Plumbing and no communications. During the hearing on December 18,

¹⁶ Deposition of William Bromley, April 16, 2019, p.161-163. Exhibit 16.

¹⁷ Carolina Cool's Second Supplemental Requests for Production dated 11-20-18. Exhibit 17.

¹⁸ Defendants' Responses to Second Supplemental Requests for Production and Privilege Log dated 3-14-19. Exhibit 18.

¹⁹ Countryman's Email dated October 8, 2018, and documents Bates stamped Countryman 10-8-18 1- Countryman 10-8-18 87. Exhibit 19.

2019, counsel for Carolina Cool argued this email could have been a signal by Garrard to Billys Plumbing as to what documentation Garrard wanted Billys Plumbing to produce.

In lieu of having a hearing on October 9, 2018, Carolina Cool and Billys Plumbing entered into a Consent Order filed October 11, 2018. Carolina Cool agreed Billys Plumbing could redact certain information due to Billys Plumbing concern its pricing and trade information would become public. Carolina Cool made that concession not knowing Billys Plumbing and Garrard had entered into a time and materials contract dated January 23, 2017 discussed in further detail below. In order to enforce the Consent Order, Carolina Cool was required to file a Motion for Order of Contempt/Sanctions on November 20, 2018, which was granted on April 3, 2019.

Pursuant to the Orders requiring Billys Plumbing to fully respond to Carolina Cool's subpoenas, Billys Plumbing produced over 1,700 documents. Through this production of documents, Carolina Cool finally discovered extremely relevant documents including correspondence and emails between Garrard and Billys Plumbing, as well as, a third subcontract between the parties. The emails showed Garrard had been in contact with Billys Plumbing while Carolina Cool was still working on the project. The emails included the following:

- **Email from Shawn Gill to Scott Gasque dated January 6, 2017:**²⁰

Scott, In follow up to our conversation a few moments ago, please find the link below to the construction drawings for the Dave and Buster's Myrtle Beach Interior project. Please note that the drawings at the below link are the current construction drawings, however Bulletin #1 was released on Tuesday and those sheets concerning any plumbing changes are in the Bulletin #1 folder, in that bulletin #1 they did flip the family restroom lavatory and toilet so you know. Give me a call when you have checked out the site. Thanks

- **Email from Scott Gasque to Shawn Gill dated January 18, 2017:**²¹

Shawn, I have made a site visit and talked to your superintendent Bill. I see Carolina Cool is still on site working. In order for me to be able to help you we need to work out some paper work. We need confirmation on when Carolina Cool will off the project permanently. Also need to work about the material they have

²⁰ Email from Shawn Gill to Scott Gasque dated January 6, 2017, Billy's Plumbing 1762. Exhibit 20.

²¹ Email from Scott Gasque to Shawn Gill dated January 18, 2017, Billy's Plumbing 1772. Exhibit 21.

on site now. I am working on setting up man power to finish the underground. But can not go much further than that until we work out the details. Please let me know how you want me to proceed.

- **Email from Shawn Gill to Scott Gasque dated January 18, 2017:**²²

Scott, Sorry I have been on the phone with our owner and am waiting on confirmation back from our attorney that we are buttoned up on the appropriate notices and paperwork to legally remove the current plumbing contractor. Our attorney is to let me know the exact time we can release them. We are working on it. I will be in touch soon. Thanks

- **Email from Shawn Gill to Scott Gasque dated February 1, 2017:**²³

Scott, Sorry, I was on a site all day and ran out of day, but my coordinator did send me your subcontract to review today through our paperless system and I did not get to review and initial. I will review this evening and if all is good I will have Cherie send it to you in the morning. You should see it tomorrow. Send me your shell number as soon as you get it together tomorrow. Also, as we disucced (sic) last week, could you get me a quote for the revised floor drain and the heat tape on Bulletin #1, I need to get this submitted to the owner. Please note I have to submit the subcontractor change request with any owner change request as back up and they require the change requests to be broken down in Labor, Material, Tax and 10% OH&P. Thanks

Billys Plumbing also produced a previously unknown subcontract, dated January 23, 2017, to furnish material and labor to complete the underslab plumbing.²⁴ There were additional emails between Shawn Gill and Scott Gasque regarding this contract as well:

- **Email from Scott Gasque to Shawn Gill dated January 23, 2017:**²⁵

Shawn, attached is our proposal from the T & M to finish the underground. Please review and return a signed copy as coon as you can. My superintendent should already be on site bu now. I have other man power and equipment headed that way also. Please advise if there is any issues.

- **Email from Shawn Gill to Scott Gasque dated January 23, 2017:**²⁶

Scott, See attached signed copy per your request. Thank you!

²² Email from Shawn Gill to Scott Gasque dated January 18, 2017, Billy's Plumbing 1771. Exhibit 22.

²³ Email from Shawn Gill to Scott Gasque dated February 1, 2017, Billy's Plumbing 50. Exhibit 23.

²⁴ Billys Plumbing Time and Material subcontract dated January 23, 2017, Billy's Plumbing 1787. Exhibit 24.

²⁵ Email from Scott Gasque to Shawn Gill dated January 23, 2017, Billy's Plumbing 1776. Exhibit 25.

²⁶ Email from Shawn Gill to Scott Gasque dated January 23, 2017, Billy's Plumbing 1775. Exhibit 26.

Carolina Cool would not have learned of the January 23, 2017 subcontract and all the email communications had it not aggressively pursued enforcement of its subpoenas. Garrard had refashioned the January 23, 2017 subcontract into the change order dated May 12, 2017 in the amount of \$23,237.22.²⁷ Additionally, the January 23, 2017 time and materials subcontract contained the following relevant terms and conditions:²⁸

- This is an agreement between Garrard Group & Billy's Plumbing Company, LLC. (From here out known as BPC.) **BPC shall not have any contact with Carolina Cool, nor their Bonding Company.** Garrard is to handle any issues that may arise from either party.
- **Garrard Group is to be responsible for all, legal representation if needed to protect BPC from Carolina Cool and/or Bonding Company.** Legal representation shall be of BPC choice.
- Garrard Group agrees to pay the Labor Rates and OH & P percentage as laid forth above in full to BPC with-in net 30 days, regardless if Garrard Group has received reimbursement from the Owner or Bonding Company.
- BPC to supply Garrard Group with a list of man hours, list of material and any additional cost for review for payment. (emphasis added).

In reviewing the content of these emails and the January 23, 2017 subcontract, there is no reasonable explanation as to why these records had not been produced by Garrard except for the conclusion they are detrimental to Garrard's defenses and counterclaim. After receiving the documents from Billys Plumbing, Carolina Cool provided a copy of the documents as part of its supplemental discovery responses.

C. Deposition of Garrard Witnesses:

During this same discovery period, Garrard also hindered Carolina Cool's ability to depose individuals named as witnesses by Garrard. Due to Garrard's failure to cooperate, on February 15, 2019, Carolina Cool filed a Motion to Compel Depositions of Defendants' Witnesses and to Impose Sanctions. An Order Granting the Motion was filed April 1, 2019 requiring the witnesses

²⁷ Change Order #2 dated 5-12-17, Defendants 432. Exhibit 10.

²⁸ Billys Plumbing Time and Material subcontract dated January 23, 2017, Billy's Plumbing 1787. Exhibit 24.

to attend their depositions and awarding fees and costs to Carolina Cool. Thereafter, Carolina Cool deposed the witnesses and the witnesses provided pertinent testimony showing additional discovery violations by Garrard.

1. Deposition of William Bromley:

During the deposition held April 16, 2019 of William Bromley, the interior job superintendent for Garrard, Mr. Bromley testified he had not looked for any relevant emails, nor had he been asked to look:

Ms. Neill: I'll show you what is Bates stamped Billy's Plumbing 1762. It's an email dated January 6th from Shawn to Billy's Plumbing which you're cc'd on, and Shawn is giving them a link to the project plans. Do you recall receiving an email and thinking, Oh, wow, there's a new plumber about to take over?

Mr. Bromley: Do I recall it? No.

Ms. Neill: Do you recall getting emails regarding Billy's Plumbing?

Mr. Bromley: An email like this I wouldn't even look at twice.

Ms. Neill: Do you get a lot of emails?

Mr. Bromley: Yes, I get a lot of emails. If it really doesn't have anything to do with me; and this wouldn't, sending Scott a link, it would just get filed.

Ms. Neill: It just seems like since you're supervising the subcontractors --

Mr. Bromley: But they were not hired as a subcontractor at that time.

Ms. Neill: But it's discussing replacing a current subcontractor.

Mr. Bromley: Okay. But I do not recall that.

Ms. Neill: Have you gone back to look at what emails you might have regarding this project?

Mr. Bromley: No, I have not.

Ms. Neill: Have you been asked to go back and look at emails you may have?

Mr. Bromley: I have not.

Ms. Neill: Is there a possibility you have more emails regarding this project that have not been --

Mr. Bromley: There's a possibility, yes.

Ms. Neill: So from this email it appears, as early as January 6th, plans are being emailed to Billy's Plumbing. Is that correct?

Mr. Bromley: I didn't read it. But if that's what it says, yeah. It's saying here's the drawings and then a bulletin had come out.²⁹

²⁹ Deposition of William Bromley, April 16, 2019, p. 164-166. Exhibit 16.

Mr. Bromley was also asked if he recalled another email produced by Billys Plumbing he was copied on between Garrard and Billys Plumbing to which he replied:

Mr. Bromley: This specific email? No. But it doesn't surprise me any. I mean, that's common communication.

Ms. Neill: And this communication, would you agree it seems to reflect that – It seems pretty evident that a decision has been made for Carolina Cool to be let go?

Mr. Bromley: Yes.³⁰

Even though the emails were between Garrard and Billys Plumbing and copies had already been provided by Carolina Cool, Garrard's counsel interrupted:

Ms. Neill: I will give you a copy of an email, again from Scott Gasque ...Billy's Plumbing Bates stamp 66.

Mr. Countryman: You-all didn't produce this or identify this before the deposition. Right?

Ms. Neill: No. You (sic) actually provided this.³¹

Mr. Countryman: Did you identify it as a potential deposition exhibit for the deposition as Rule 30(j)(8) requires?

Ms. Neill: This is not a deposition exhibit right now.

Mr. Countryman: It's a document that you're showing the witness. I can read you the language of the rule if you'd like.

Ms. Neill: Well, it's something that you had and it came from Scott to Shawn Gill, but it's something that apparently you-all have not produced in discovery, even though you had it in your records.

Mr. Countryman: That has nothing to do with the rule, which says deposing counsel shall provide to opposing counsel a copy of all documents showing to the witness during the deposition, either before the deposition begins or contemporaneous with the showing of the document to the witness, which you obviously have not done. You've identified the labels. That's fine –

Ms. Neill: We provided this to you before, though.

Mr. Countryman: That's not what the rule says, does it? I'm just asking if you specifically identified that document as something that you would use in the deposition before. I don't think you have.³²

³⁰ Deposition of William Bromley, April 16, 2019, p. 172. Exhibit 16.

³¹ The document was produced by Billys Plumbing in response to the subpoena. It was an email between Shawn Gill, Project Manager for Garrard, and Scott Gasque of Billys Plumbing. All documents received from Billys Plumbing had been produced to Garrard prior to the deposition.

³² Deposition of William Bromley, April 16, 2019, p. 167-168. Exhibit 16.

This exchange reveals no denial by Garrard's counsel of having the emails or being aware of the emails. There was no denial that Garrard failed to produce the emails to Carolina Cool. Furthermore, Mr. Bromley had not even been asked to look for emails. Remarkably, even after the deposition, Garrard failed to produce the communications it had with Billys Plumbing.

Mr. Bromley also testified his permanent residence was in Waleska, Georgia, and he had no intention of living in Massachusetts.³³ He was only temporarily living in Massachusetts because he was currently working for Garrard on a Dave & Buster's project located in Cape Cod. This information was important because prior to his deposition, Garrard's counsel requested Carolina Cool reimburse Mr. Bromley mileage and witness fees of \$1,081.76 for roundtrip travel from Massachusetts instead of calculating mileage from his residence in Georgia.³⁴ This request is particularly outrageous given the fact that Carolina Cool had been seeking to depose Mr. Bromley for over a year and counsel for Garrard had initially offered to host the deposition in Mt. Pleasant. Carolina Cool did compensate Mr. Bromley his mileage calculated from his residence in Georgia at less cost.

2. Deposition of Shawn Gill:

On April 17, 2019, Carolina Cool deposed Shawn Gill, Garrard's Project Manager for the entire Dave & Buster's project. Mr. Gill testified regarding a timeline he drafted that had not been produced:

Mr. Gill:	I would have to look at data reports and then also the timeline that I submitted.
Ms. Neill.	And when you say "timeline," what document are you referring to?
Mr. Gill:	I provided a timeline during this whole period of what was moved and when. It was part of the discovery.
Ms. Neill.	Okay. And what would that timeline look like? Is it entitled "Timeline"?

³³ Deposition of William Bromley, April 16, 2019, p. 6, 212-213. Exhibit 16.

³⁴ Correspondence from Andrew Countryman dated April 12, 2019. Exhibit 27.

Mr. Gill: Yeah. It's entitled "Timeline." I believe it's a three-page document.

Mr. Countryman: That may be work product. I'm not sure of the context of the production. If we produced it, you're welcome to ask him about it, but I need to look at it and see if it's attorney work product.

Ms. Neill: I'm not familiar with having a timeline. Do you recall when you made the timeline?

Mr. Gill: I do not remember.

Ms. Neill: Was it within the last couple of years?

Mr. Gill: It was during this time to basically document what was going on specifically in relation to the project and the Carolina Cool situation

Ms. Neill: And when you say "this time," you're talking about -- you were kind of motioning towards the calendar. During January?

Mr. Gill: Yes, in January.

Ms. Neill: So sometime in -- gosh, it's amazing it was two years ago. So sometime in January of 2017 there was a timeline?

Mr. Gill: It probably would have been late January 2017, yes.

Ms. Neill: Is that something that would be created under the 360 software?

Mr. Gill: No. It was an independent document that I created just to document.

Ms. Neill: Like a Word document?

Mr. Gill: Yeah. It was a Word document.³⁵

Later during the deposition when the missing timeline was referenced again, Garrard's attorney offered the following while looking at files on his laptop computer:

Mr. Countryman: I think I have that.

Ms. Neill: Mr. Countryman, you believe you have what Mr. Gill is talking about?

Mr. Countryman: Yeah. I'm looking at it to see if it's privileged. I'm looking at a discovery folder that I have not had access to before today. I produced stuff that I'd received. So I didn't remember whether I had gotten this and produced it before. And I don't know as we sit here right now if I have. But would you let me talk with him for a second privately to see if there's any issue with privilege or work product? If there's not, then I can produce it to you.³⁶

Mr. Countryman's statement, if accurate, reveals Garrard's counsel had just received on April 17, 2019 a discovery folder which may or may not contain relevant documents not yet

³⁵ Deposition of Shawn Gill, April 17, 2019, p. 31-33. Exhibit 28.

³⁶ Deposition of Shawn Gill, April 17, 2019, p. 158. Exhibit 28.

produced. In fact, the timeline had not been previously produced, along with other documents discussed by Mr. Gill. For example, Mr. Gill testified regarding the existence of emails between Garrard and its subcontractors, as well as, with Broadway and Dave & Buster's:

- Ms. Neill: And when you say the e-mails, between who?
 Mr. Gill: You know, there was always e-mails from him to subcontractors, subcontractors to him, as well as myself between me and my superintendent, me and Bill or Pat on that project.
- Ms. Neill: And have you gathered those e-mails related to this project?
 Mr. Gill: To the best of my knowledge, I've submitted -- we did a -- when you get that many e-mails, you did a search for that whole thing and turned them over to Rebekah, and then she submitted them with the -- to Andrew with the discovery requests.
- Ms. Neill: And when would that have taken place?
 Mr. Gill: Um, there were -- I believe there were some e-mails on the first discovery request and then we figured out how to go in and consolidate them and print them to PDF, and so there were more that were sent with the second discovery request.
- Ms. Neill: Okay. And approximately when was that second discovery request?
 Mr. Gill: Two months ago.
- Ms. Neill: Did you -- how did you communicate with Seth McCoy with Broadway?
 Mr. Gill: Via phone and e-mail.
- Ms. Neill: And how did you communicate with Dave & 8 Buster's folks?
 Mr. Gill: Both phone and e-mail and through Expesite when we submit RFIs or change requests or submittals. I guess that would be considered communication as well.
- Mr. Countryman: Mary Anna, I didn't withhold anything from that. I'm looking at what I produced to you all recently. I don't see e-mails, other than the ones that were between -- it looks like stuff that was between Garrard and Burroughs & Chapin. But if there's something we missed, that's fine. But I was not withholding anything.
- By Ms. Neill: Thank you.³⁷

Mr. Gill also testified about the existence of emails between himself and Billys Plumbing:

- Ms. Neill: And did you tell Billy's Plumbing that?
 Mr. Gill: I did. And I believe I also told him in an e-mail to hold tight; you know, we don't know what direction this is going to go.
- Ms. Neill: And from this period of time, January 25 2017, where are all your e-mails stored?
 Mr. Gill: In Office 365, our e-mail server, I guess you would call it.

³⁷ Deposition of Shawn Gill, April 17, 2019, p. 100-101. Exhibit 28.

- Ms. Neill: And have you looked for e-mails you may have had with anybody at Billy's Plumbing?
- Mr. Gill: Yes.
- Ms. Neill: And have you found e-mails?
- Mr. Gill: Yeah. So we did a -- it was requested through the second discovery request, Rebekah and I went into my e-mails and did a search for anything that was Scott Gasque or Billy's Plumbing. And anything that came up on that, Rebekah printed a PDF and provided to our attorney.
- Ms. Neill: And you've provided those documents?
- Mr. Gill: Yes.
- Mr. Countryman: I don't recall there being any e-mails in that production in April.
- Ms. Neill: I have not received any e-mails regarding Billy's Plumbing except for what Billy's Plumbing just gave us in response to the Subpoena.
- Mr. Countryman: Let me check on that -- I didn't receive something and failed to give it to you in that regard. Let me see if there's something that I overlooked.
- Mr. Gill: Me and Rebekah did that, and I assume she got that to you. I can check with Rebekah, but we did do a search for that.
- By Ms. Neill: So there are more e-mails possibly out there from you to Billy's Plumbing?
- Mr. Gill: In addition to what?
- Ms. Neill: The zero that I have.
- Mr. Gill: There were some, and I served all those up. We printed them to PDF, and I'll circle back with Rebekah and make sure those are part of -- but there were e-mails between me and Billy's Plumbing.³⁸

Mr. Gill's testimony shows Garrard did indeed have emails with Billy's Plumbing that it failed to produce. As set forth above, the emails in question contain critical information that even a layman would recognize as being relevant to the litigation. Even if the emails were not determined to be relevant, they should have been produced as requested.

During the deposition it was discovered other documentation had not been produced. For example, Garrard produced weekly construction reports regarding the interior portion of the project, but week three, which was one of five weeks Carolina Cool was there, was missing. After

³⁸ Deposition of Shawn Gill, April 17, 2019, p. 182 - 184. Exhibit 28.

Mr. Gill was asked why week three had not been produced, Mr. Countryman found it in his files on his laptop and stated "I apologize for that oversight. I don't know why that didn't come through the first time."³⁹

During the deposition it was further determined documents had not been produced in the manner they had been routinely maintained. In looking at construction schedules created during the project, it was difficult to ascertain to which week the schedule corresponded because they were not dated. Mr. Gill explained that each report had been created and saved in separate files and each file name would have included the date it was created. Mr. Gill testified:

I know all this gets - - what it looks like to me is it gets lumped in as a PDF. And if they were the individual files, like we have them saved, it would - - you know, you would be able to pull it up and look at that percentage and say, okay, this is that schedule by the file name.⁴⁰

In order for Mr. Gill to determine the dates of documents he himself created, Mr. Gill looked at Mr. Countryman's laptop to view the files in the format in which they were provided to Mr. Countryman:

Mr. Countryman: What she's looking at, I have the same thing pulled up; they're just color copies. Those are probably easier to read because they're bigger print, but the color you can see here.

Mr. Gill: But the file name is what's important to me to be able to determine which date that was -- the update for that date.

Mr. Countryman: I don't have that right here. I can pull that up under Dropbox. I just put everything in one PDF. So you're saying that the data files -- the individual calendars have dates on them, which will let you tell us when each one was created?

Mr. Gill: By the file name, yes.

Ms. Neill: Yeah. Because that's the important information that we need.

Mr. Countryman: Well, then, I'm looking at his Dropbox where he -- a link where he sent me those.

Ms. Neill: Why don't we go ahead and mark this as Plaintiff's 14 so we can refer to the same document while we're talking on the record?

³⁹ Deposition of Shawn Gill, April 17, 2019, p. 110, line 17-p. 111, line 5.; p. 113, line 25- p. 114, line 7. Exhibit 28.

⁴⁰ Deposition of Shawn Gill, April 17, 2019, p. 125, lines 18-23. Exhibit 28.

Ms. Neill: And just for the record, we're looking at what has been marked as Plaintiff's 14, and we're comparing it to some schedules that are being shown on the personal laptop computer of Mr. Countryman.⁴¹

This testimony reveals the documents were not produced to Carolina Cool in the manner in which they were created and maintained. Instead, they were provided in a manner which hindered Carolina Cool's ability to determine important information.

Thereafter, Mr. Gill was asked if he created schedules for the time period after Carolina Cool was terminated:

Ms. Neill: Now, are there additional schedules after January 19th?
 Mr. Gill: Yes.
 Ms. Neill: And would you also have those?
 Mr. Gill: Yes.
 Ms. Neill: And is that something that you have been asked to look for?
 Mr. Gill: I understood that we were to supply the schedule updates for the duration in question.
 Ms. Neill: Not for the whole project?
 Mr. Gill: I did not understand it that way, the best I remember.
 Ms. Neill: So you --
 Mr. Gill: But I would be happy to -- we have those schedules.
 Ms. Neill: You have those schedules for the --
 Mr. Countryman: I can get you those if they haven't been provided.
 Ms. Neill: And you're saying it's your understanding you weren't supposed to produce any additional schedules than the ones we have in Exhibit 14?
 Mr. Gill: Yes.⁴²

Mr. Gill also testified regarding the January 23, 2017 subcontract with Billys Plumbing which had not been produced to Carolina Cool:

Ms. Neill: Now, after Carolina Cool left the project, according to the job site reports, it looks like Billy's Plumbing was there the following Monday; is that correct?
 Mr. Gill: Correct.
 Ms. Neill: And I'll show you what is Bates stamped - let's see. What is it? Defendant's 17- -- I'm sorry -- Billy's Plumbing 1787. And it looks like a document from Billy's Plumbing, and it's dated January 23rd. Do you remember receiving that?

⁴¹ Deposition of Shawn Gill, April 17, 2019, p. 131, line 3 – 132, line 9. Exhibit 28.

⁴² Deposition of Shawn Gill, April 17, 2019, p. 138, line 20 -p. 139, line 17. Exhibit 28.

- Mr. Gill: Yes.
- Ms. Neill: And is that your signature on the document?
- Mr. Gill: It is.
- Ms. Neill: And would this be a document that you would keep a record of in your file?
- Mr. Gill: So this was basically based on the -- the plumbing lines that were roughed in incorrectly and the ones that weren't finished. There was no way to put a hard number on that to complete it. So Billy's Plumbing gave me rates to -- hourly rates to repair that and replace, because there was no way to put a hard number on it. In addition, Billy's Plumbing did not want to be -- the stuff that wasn't going to be touched that was installed, they did not want to be responsible for any issues down the road.
- Ms. Neill: That Carolina Cool had been involved with?
- Mr. Gill: Correct.
- Ms. Neill: And this looks like a contract to me, correct?
- Mr. Gill: Correct. It's an hourly rate agreement is what it is.
- Ms. Neill: An hourly rate agreement. And you maintained that in your file for the Myrtle Beach Dave & Buster's project?
- Mr. Gill: Yes. It would have been -- yes.
- Ms. Neill: And are there any other documents that you would have had with Billy's Plumbing, any other agreements?
- Mr. Gill: We had a subcontract with them at a later date to do the -- everything from the slab up. This was specifically for the underslab. And then we had a formal subcontract similar to what our subcontract was with Carolina Cool for all the work above the slab.
- Ms. Neill: And during the course of this lawsuit, did you look for your agreements you had with Billy's Plumbing?
- Mr. Gill: Yeah. When we were asked for discovery, we were asked for their subcontract, their checks, their pay applications and all that.
- Ms. Neill: And would this document be regarding their subcontracts?
- Mr. Gill: Would be what?
- Ms. Neill: A subcontract you would have with Billy's Plumbing?
- Mr. Gill: Yes. This should be on -- in our files, yes.
- Ms. Neill: Because Billy's Plumbing, they didn't contract directly with the owner, right?
- Mr. Gill: No.
- Ms. Neill: They contracted with Garrard?
- Mr. Gill: That's correct.
- Ms. Neill: And do you have any idea why Garrard wouldn't have produced this document in discovery?
- Mr. Gill: I don't know why we wouldn't have. I mean, if it wasn't provided -- if it wasn't provided, it wasn't intentional.⁴³

⁴³ Deposition of Shawn Gill, April 17, 2019, p. 185, line 24 -p. 188, line 13. Exhibit 28.

Mr. Gill was further asked about an invoice from by Billys Plumbing which had not been produced by Garrard:

- Ms. Neill: You mentioned a few moments ago an invoice, and I just want to see if this is the invoice you were talking about. It's dated March 31st.
- Mr. Gill: Yes. This would be the invoice related to those hourly rates.
- Ms. Neill: Again, would an invoice from a subcontractor be something that you would regularly keep in your project file?
- Mr. Gill: This would be with the accounting file, yes. With -- any invoices paid to Billy's Plumbing, this would be with it, yes.
- Ms. Neill: And do you have any information as to why it wasn't produced by Garrard?
- Mr. Gill: I don't know why it wouldn't have been. It wouldn't have been intentional.
- Ms. Neill: Let's mark that as Plaintiff's 26.
- Mr. Gill: I believe we provided all the checks that we paid Billy's Plumbing, so there should be a check in the amount of whatever this invoice was.
- Mr. Countryman: I think that's right. And for the record, I produced a ton of material. If there are things that arise out of this deposition that you don't have and you think you should, I'll happily get you that material. But there was nothing withheld intentionally. To the extent that you don't have something that you think you should have, I'm happy to address that.
- By Ms. Neill: That's the problem in discovery. One side doesn't know what the other one has. And then you get bits and pieces, and we got that from Billy.⁴⁴

Mr. Gill's testimony reveals serious violations of the Rules of Civil Procedure by Garrard. Mr. Gill personally executed the contract and personally received the invoice from Billys Plumbing. The documents would have been maintained in the same file in which other documents had been pulled and produced to Carolina Cool. This indicates someone deliberately determined not to produce those documents. Furthermore, Mr. Countryman's interjection shows a complete misunderstanding of a party's responsibility in responding to discovery requests. Had not Carolina

⁴⁴ Deposition of Shawn Gill, April 17, 2019, p. 189- 191. Exhibit 28.

Cool subpoenaed Billys Plumbing and then followed up with motions to compel, key evidence in Garrard's possession would have never come to light.

3. Deposition of Pat Watson:

On May 8, 2019, Carolina Cool deposed Pat Watson who was the project manager for the shell portion of the project. He also testified regarding emails that should exist and notes he personally drafted. He further testified he had not been asked to find documents relevant to the project:

- Ms. Neill: How did you stay in contact with Shawn Gill regarding this Myrtle Beach Dave and Buster's site?
- Mr. Watson: We had several phone calls every day and e-mails back and forth a lot.
- Ms. Neill: Would there be notes on the project from you after February 20th?
- Mr. Watson: I would think so, but at some point in time I do quit taking them, when I see that I don't need to take them no more. I ain't gonna have no issues, I'm getting close to being done, then I'll quit taking them.
- Ms. Neill: In February of 2017, you weren't close to being done though were you?
- Mr. Watson: I should have still been making notes.
- Ms. Neill: Have you been asked to find any notebooks or notes for this lawsuit?
- Mr. Watson: No, ma'am.⁴⁵

4. Deposition of John Mulleady:

On May 15, 2019, Carolina Cool conducted the 30(b)(6) deposition of Dave & Buster's.

Mr. John Mulleady testified regarding payments to Garrard for the interior portion of the project:

- Ms. Neill: And did Dave & Buster's make the payments as requested from Garrard Construction?
- Mr. Mulleady: Yes, I think we did. Doesn't show that we have anything withholding.
- Ms. Neill: And how would the payments have been made?
- Mr. Mulleady: Either check or wire. I don't know. They do it both -- accounting does it both ways.
- Ms. Neill: And would the accounting department retain documentation of making those payments?
- Mr. Mulleady: They should, yeah.
- Ms. Neill: Would those documents be something that Dave & Buster's would retain in their file for this project?
- Mr. Mulleady: They should.

⁴⁵ Deposition of Patrick Watson, May 8, 2019, p. 14, lines 20-24. Exhibit 29.

Ms. Neill: Do you know why those documents weren't produced to us?
Mr. Mulleady: No, I don't.
Ms. Neill: You think that is something that could be provided to us?
Mr. Mulleady: I guess.
Ms. Neill: Yes?
Mr. Mulleady: Yes.⁴⁶

D. Carolina Cool's Letter of August 22, 2019:

Several months passed after the depositions and Defendants did not produce the missing documentation discussed during the depositions. In a letter dated August 22, 2019,⁴⁷ counsel for Carolina Cool detailed all occurrences the witnesses testified regarding the existence of evidence that had not yet been produced:

In reviewing the deposition transcripts of the other witnesses for Defendant Garrard, the witnesses confirmed the existence of other relevant documents that I have not found in my review of documents produced thus far during discovery. Specifically, the witnesses confirmed the existence of the following:

- Documentation of payments from Dave & Buster's to Garrard Construction referenced by Mr. Mulleady on pages 68 & 69 of his deposition;
- Change orders for the interior contract referenced by Mr. Mulleady on pages 71 & 73 of his deposition;
- Work Orders with supporting documentation referenced by Mr. Mulleady on pages 75, 101 & 101 of his deposition;
- Emails referenced by Mr. Mulleady on pages 87, 88 & 92 of his deposition;
- Emails between Pat Watson and Shawn Gill referenced by Pat Watson on page 14 of his deposition;
- Pat Watson's complete notebook referenced by Pat Watson on pages 56-58 of his deposition;
- Pat Watson's emails with MH Brown referenced by Pat Watson on page 76 of his deposition;
- Pat Watson's progress reports for February 21, 2017 – March 24, 2017 referenced by Mr. Watson on page 100 of his deposition;
- Complete copy of the document marked as Exhibit 2 to Mr. Bromley's deposition discussed on page 155 of the deposition;
- Emails that Mr. Bromley may have as discussed on page 165 of his deposition;

⁴⁶ Deposition of John Mulleady, May 25, 2019, p. 68-69. Exhibit 30.

⁴⁷ Correspondence to Andrew Countryman dated August 22, 2019. Exhibit 31.

- The meeting agendas Mr. Bromley created as discussed on page 189 of his deposition;
- NSO calendar discussed by Mr. Gull in his deposition at page 118;
- The four schedules (Exhibit 14 to Mr. Gill's deposition) that you attempted to email to Mary Anna on April 17, 2019 which was not received as discussed on page 137 of Mr. Gill's deposition;
- All schedule updates for the project as discussed by Mr. Gill on pages 138-139;
- All documentation that Mr. Gill referenced in his deposition on pages 183 and 184 regarding Billys Plumbing – he testified there were documents printed and provided.

In as much as these documents have been previously requested in Plaintiff's Request for Production of Documents, please provide these documents no later than **September 6, 2019**. If you believe you already provided them, please let me know when those documents were produced and how they were Bates stamped.

After Garrard failed to respond the August 22, 2019 letter, Carolina Cool's counsel requested in a subsequent letter dated September 16, 2019 the documents be produced within ten days to avoid the necessity of a motion to compel.⁴⁸

E. Garrard's Document Dump of September 25, 2019:

In response to Carolina Cool's letters, on September 25, 2019, Garrard produced over four thousand documents. The letter from Garrard's counsel stated:

I enclose a disc with material labeled "Garrard 9.25.19 prod. 1-4,401." This is material from Garrard responsive to your August 22, 2019, letter and is a supplement to my clients' production in discovery.⁴⁹

In reviewing the documents on the enclosed disc, Carolina Cool discovered 4,201 pages on the disc, not 4,401.⁵⁰ The documents on the disc did not appear to be in any particular order and many were copies of documents previously produced in discovery but with different Bates stamp. For example, hundreds of pages of Daily Progress Reports were once again produced Bates

⁴⁸ Correspondence from Mark Neill dated September 16, 2019. Exhibit 32.

⁴⁹ Correspondence from Andrew Countryman dated September 25, 2019. Exhibit 33.

⁵⁰ Garrard 9.25.19 prod. 000001-004201. Exhibit 34.

stamped Garrard 9.25.19 prod. 002947---3295. These reports were not even requested in the August 22, 2019 letter. While the majority of reports had previously been produced, buried within were some newly produced reports found at Bates stamped Garrard 9.25.19 prod. 002967---, 002974 and 003094-003169. Counsel for Carolina Cool was required to spend many unnecessary hours digging through the thousands of documents in order to determine which were duplicates and which contained new information. The fact that the documents were not in chronological order added to the burden.

Shockingly, in the 4,201 documents produced, Garrard failed to produce all the specifically requested emails and subcontract documents Mr. Gill testified existed between Garrard and Billys Plumbing. Carolina Cool could only find three of them: an email from Scott Gasque on January 18, 2017, Bates stamped Garrard 9.25.19 prod. 004119; an email from Shawn Gill dated January 18, 2017, Bates stamped Garrard 9.25.19 prod. 004122; and an invoice from Billys Plumbing dated March 31, 2017 Bates stamped Garrard 9.25.19 prod. 004009. It is troubling Garrard produced the invoice and the two emails hidden in a document dump two years after Carolina Cool served its initial discovery. Garrard continued to fail to produce the January 23, 2017 subcontract with Billys Plumbing.

F. Discovery Responses of Billys Plumbing:

After Billys Plumbing became a party defendant, Carolina Cool served discovery requests. Interrogatory #8 asked Billys Plumbing to identify all contracts it entered into regarding the Dave & Buster's project. After not receiving any response, Carolina Cool filed a motion to compel on September 9, 2019 and a hearing was scheduled for October 15, 2019. The parties entered into a consent order prior to the hearing, which was filed October 16, 2019. Pursuant to the order, Billys

Plumbing provided a very different response than offered by Garrard during the two years of discovery:

8. Identify each and every contract you entered into regarding the Myrtle Beach Dave & Buster's project setting forth the following information:
 - a. The parties to the contract;
 - b. The date of the contract;
 - c. The work you were to perform;
 - d. The dates you performed the work;
 - e. The compensation you received for performing the work.

ANSWER:

1. Dave & Buster's Underground Contract – **Contract entered into between Billy's Plumbing Company and Garrard on January 23, 2017** to furnish labor and materials to correct and complete the underground plumbing portion of the Dave & Buster's project. The work was performed on a time and materials basis and the dates of said work are contained in the time cards previously provided by Defendant and described as Plaintiff's bates stamp documents "Billy's Plumbing 75-80." Defendant **Billy's Plumbing was compensated in an amount of \$23,237.22.**
2. Dave & Buster's Interior Subcontract – Contract entered into between Billy's Plumbing and Garrard Construction Company on February 1, 2017. Defendant Billy's Plumbing Company would direct Plaintiff's attention to the scope of work and scope of work breakdown included in the contract as well as its attachments as referenced in Defendant Garrard Construction Company bates stamp documents "Countryman 10-8-18 38-68." Dates of said work are contained in the time cards previously provided by Defendant to Plaintiff's Counsel on July 9, 2019. Defendant Billy's Plumbing was compensated in the amount of \$356,171.24.
3. Dave & Buster's Shell Subcontract – Contract entered into between Billy's Plumbing and Garrard Construction on March 16, 2017. Defendant Billy's Plumbing Company would direct Plaintiff's attention to the scope of work and scope of work breakdown included in the contract as well as its attachments as referenced in Defendant Garrard Construction Company bates stamp documents "Countryman 10-8-18 69-83. **Defendant Billy's Plumbing Company has no record of ever being compensated for work performed under this contract.** Said work would have neem performed during the dates and times provided in the time cards previously provided by Defendant to Plaintiff's Counsel on July 9, 2019.⁵¹ (Emphasis added).

⁵¹ Billys Plumbing Responses to Plaintiff's Interrogatories, dated October 18, 2019. Exhibit 35.

Billys Plumbing identified the January 23, 2017 subcontract as a separate agreement. In contrast, Garrard attempted to hide the contract and show the monies paid Billys Plumbing was for a change order to the Interior Subcontract subsequently executed. Carolina Cool was astonished to learn that no compensation had been paid by Garrard to Billys Plumbing pursuant to the Shell Subcontract, which certainly is a crucial factor in determining the validity of Garrard's counterclaim against Carolina Cool.

G. Carolina Cool's Motion for Sanctions:

As one could imagine, it took several days for Carolina Cool's counsel to review the materials in the document dump. After reviewing the information provided by Garrard and the newly produced information from Billys Plumbing, Carolina Cool filed its Motion for Sanctions on November 4, 2019.

H. Garrard Withdraws its Counterclaim for lost profits:

In its counterclaim and in its answers to interrogatories, Garrard claimed it was entitled to lost profits. This is one of the reasons Carolina Cool continuously requested information from Garrard regarding what it paid Billys Plumbing, what work Billys Plumbing performed, Garrard's requests for payment to Broadway and Dave & Buster's, and monies received from those requests. Even after delivering the document dump, Garrard failed to provide critical information regarding its alleged damages. By way of Supplemental Requests for Production, Carolina Cool requested financial statements, profit and lost statements, expense statements, and income statements regarding the project.⁵² Carolina Cool also noticed the Rule 30(b)(6) deposition of Garrard to inquire into these matters. In response, Garrard served Supplemental/Amended Answers to Interrogatories stating, "Garrard is not making a claim for lost profits and withdraws such a claim

⁵² Supplemental Requests for Production to Garrard dated November 4, 2019. Exhibit 36.

to the extent prior pleadings refer to one.”⁵³ In a letter dated November 29, 2019, Garrard’s counsel further stated:

Garrard is not claiming lost profits as a damage in this case. Therefore, topics regarding profits and the like have no bearing on the claims between the parties and are unlikely to lead to the discovery of admissible evidence. In fact, these topics are not necessary for this litigation at all.⁵⁴

Carolina Cool’s resulting frustration is understandable in that it had battled for two years to receive information regarding Garrard’s lost profits just to have Garrard claim the information was not relevant. Carolina Cool argued during the hearing, with merit, Garrard only withdrew its claim after it was forced to produce documentation showing it had no damages.

I. Hearing held December 18, 2019:

A lengthy hearing was held on December 18, 2019 to consider Carolina Cool’s Motion for Sanctions against Garrard for discovery violations. After hearing from counsel for Carolina Cool and Garrard, reviewing the record, and considering facts presented, the Court grants Carolina Cool’s Motion for the following reasons:

CONCLUSIONS OF LAW

For more than two years, Defendant Garrard obstructed the discovery process and prejudiced Carolina Cool’s ability to prepare for trial. The record shows three scheduling orders have been filed in this case. The first Scheduling Order, filed June 29, 2018, required discovery to be completed by October 19, 2018 with the case being up for trial in December 2018. Defendant Garrard consented to that Order knowing it had withheld critical evidence from the Plaintiff. An Amended Scheduling Order, filed December 11, 2018, had a discovery deadline of June 1, 2019.

⁵³ Supplemental/Amended Answers to Interrogatories dated November 18, 2019. Exhibit 37.

⁵⁴ Letter from Andrew Countryman dated November 29, 2019. Exhibit 38.

Defendant Garrard once again consented to the Order with knowledge it was continuing to holdback critical evidence from the Plaintiff. The third Scheduling Order, filed August 23, 2019, imposed a revised discovery deadline of December 20, 2019, with the case being up for trial in February 2020. Even after the document dump on September 25, 2019, Garrard continued in its failure to produce documents.

SCRCP Rule 37 (b) allows the Court to impose sanctions or order costs against a party or attorney whose conduct necessitated the motion. There must be a showing of intentional disobedience on the part of the sanctioned party. The rule “empowers the Court to impose a wide variety of sanctions. “In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.” Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). A sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party. *See generally* Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

In Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), Mitchell failed to disclose the existence of a videotape in a personal injury case which the Court determined was relevant to the issue of damages. Mitchell had the videotape for over two years before disclosing its existence just days before trial. The Court discussed:

The entire thrust of the discovery rules involves full and fair disclosure, “to prevent a trial from becoming a guessing game or one of surprise for either party.” State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (*quoting* Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). Unless

the party who has failed to submit to discovery can show lack of prejudice, reversal is required. Id. at 46, 362 S.E.2d at 319.

In the present case, Garrard acted in willful disobedience and in gross indifference to the rights of Carolina Cool. Even after being sanctioned by Order filed April 10, 2019 for failing to cooperate in the scheduling depositions of its own witnesses, Garrard continued to holdback documents responsive to Carolina Cool's discovery requests and relevant to the parties' claims and defenses. Garrard also violated the scheduling orders. Garrard's discovery responses were incomplete, and the manner in which documents were produced prejudiced the Plaintiff's ability to prepare for trial. As such, the Court finds the striking of Garrard's Counterclaim to be a reasonable and fair sanction. Furthermore, the Court finds it is reasonable and fair to require Garrard to pay Carolina Cool attorney fees and costs in the amount of \$9,301.54 for the time spent by its counsel to review Garrard's discovery responses and deposition testimony, to draft the August 22, 2019 letter, to review the 4,201 pages of documents produced by Garrard, to draft and file the motion for sanctions, and to prepare and attend the hearing.⁵⁵

IT IS SO ORDERED!

The Honorable Benjamin H. Culbertson
Fifteenth Judicial Circuit

Dated: January __, 2020
Conway, South Carolina

⁵⁵ Affidavit of Mark D. Neill. Exhibit 39.



Horry Common Pleas

Case Caption: Carolina Cool Inc VS Garrard Construction Group Inc , defendant, et al
Case Number: 2017CP2603562
Type: Order/Sanctions

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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